(2)
Supreme Court, U.S.
FILED
991075 DEC 27 1999
OFFICE OF THE CLERK

No. 99-

CORRECTED COPY

In The

Supreme Court of the United States

VITTORIO AMUSO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL B. BERGMAN, ESQ.
PAUL B. BERGMAN, PC
950 Third Avenue
New York, NY 10022
Telephone: (212) 355-7711

RACHEL A. BELLIS, ESQ.
HADDON, MORGAN & FOREMAN, PC
150 East 10th Avenue
Denver, CO 80203
Telephone: (303) 831-7364

MICHAEL E. TIGAR, ESQ.
Counsel of Record
THE TIGAR LAW FIRM
1215 Seventeenth Street N.W.
Washington, D.C. 20036
Telephone: (202) 467-2765

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

102 PP

QUESTIONS PRESENTED FOR REVIEW

1. Can courts of appeal applying 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), set a higher standard than the one previously applied to issuance of certificates of probable cause and adopt a summary procedure for rejecting certificates of appealability without meaningful hearing or explanation, or does the AEDPA demand full appellate review of non-successor applications raising well-pleaded allegations of substantial conflicts of interest that afflict trial counsel?

2. Must the district court read the hearing provision in § 2255, as amended, to retain the promise of *Townsend v. Sain* and provide for hearings to complete the factual record on conflict of interest claims so that well-pleaded, non-successor applications brought under the AEDPA will continue to receive full and fair judicial review?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

JURISDICTION OF THE DISTRICT COURT 12

REASONS FOR GRANTING THE PETITION 12

I. When it enacted the AEDPA, Congress did not identify the threshold standards for resolving applications for certificates of appealability. This Court should expressly adopt the standards applied under the pre-AEDPA cases, as this will assure that federal prisoners like Mr. Amuso, who bring non-successor, non-frivolous § 2255 petitions presenting well-pleaded allegations of substantial conflicts of interest, receive the benefits of habeas corpus 12

II. Because the AEDPA does not address the issue, district courts must be directed to read the hearing provision under § 2255 broadly, to retain the promise of *Townsend v. Sain* and provide for hearings to complete the factual record, so that non-frivolous, non-successor petitions will continue to receive full and fair judicial review 21

CONCLUSION 26

TABLE OF CONTENTS – Continued

Page

APPENDIX

United States v. Amuso, 10 F.Supp.2d 227 (E.D.N.Y. 1998) (Nickerson, J.) 1a

Amuso v. United States, No. 98-2614, order and mandate DENYING motion for certificate of appealability and DISMISSING appeal (Winter, C.J., Feinberg and Leval, C.JJ), May 4, 1999 ..... 13a

Amuso v. United States, No. 98-2614, order DENYING petition for rehearing and for rehearing en banc, September 29, 1999 ..... 16a

28 U.S.C. § 2253 Appeal 18a

28 U.S.C. § 2255 Federal custody; remedies on motion attacking sentence 19a

Federal Rules of Appellate Procedure Rule 22 Habeas Corpus and Section 2255 Proceedings 22a

Rules Governing Section 2255 Proceedings Rule 8 Evidentiary Hearing 24a

March 20, 1992 Status Conference transcript, *United States v. Amuso*, Docket No. CR-90-446 (Nickerson, J.), submitted in support of § 2255 petition (excerpts) 26a

Affidavit of Vic Amuso, submitted in support of § 2255 petition 43a

Affidavit of Martin Geduldig, Esq., submitted in support of § 2255 petition 57a

Affidavit of Gerald Shargel, Esq., submitted in support of § 2255 petition 61a

Government's memorandum in support of its motion for an order disqualifying counsel in *United States v. Gotti, et al.*, No. 90 CR 1051 (E.D.N.Y.) (Glasser, J.), submitted in support of § 2255 petition (excerpt) 64a

TABLE OF AUTHORITIES

Page

CASES

Barefoot v. Estelle, 463 U.S. 880 (1983) 14, 15

Brecht v. Abrahamson, 507 U.S. 619 (1993) 15

Cuyler v. Sullivan, 446 U.S. 335 (1980) 7, 15, 17, 18, 19, 25

Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996) 14

Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996) 20

Familia-Consoro v. United States, 160 F.3d 761 (1st Cir. 1998) 20

Hardwick v. Singletary, 126 F.3d 1312 (11th Cir. 1997) 14

Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969 (1998) 12, 13, 16, 17

Holloway v. Arkansas, 435 U.S. 475 (1978) 15, 17, 18, 25

Lamberti v. United States, 22 F.Supp.2d 60 (S.D.N.Y. 1998) 24

Lennox v. Evans, 87 F.3d 431 (10th Cir. 1996), *cert. denied*, 519 U.S. 1081 (1997), *overruled on other grounds by United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997) 14

Lowell v. Prunty, 91 F.3d 1358 (9th Cir. 1996), *cert. denied*, 520 U.S. 1158 (1997) 14

Lozada v. Deeds, 498 U.S. 430 (1991) 15, 20, 21

Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063 (6th Cir.), *cert. denied*, 520 U.S. 1224 (1997) 14

Machibroda v. United States, 368 U.S. 487 (1962) 22

Mathews v. United States, 11 F.3d 583 (6th Cir. 1993) 23

TABLE OF AUTHORITIES – Continued

Page

Moore v. Reynolds, 153 F.3d 1086 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 1266 (1999) 16

Nelson v. Walker, 121 F.3d 828 (2d Cir. 1997) 15

Nichols v. United States, 75 F.3d 1137 (7th Cir. 1996) 23

Ortiz v. Stewart, 149 F.3d 923 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1777 (1999) 25

Payne v. United States, 78 F.3d 343 (8th Cir. 1996) 23

Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) 23

Reyes v. Keane, 90 F.3d 676 (2d Cir. 1996) 15

Sanders v. United States, 373 U.S. 1 (1963) 22

Schledwitz v. United States, 169 F.3d 1003 (6th Cir. 1999) 15

Shaw v. United States, 24 F.3d 1040 (8th Cir. 1994) 23

Sonnier v. Johnson, 161 F.3d 941 (5th Cir. 1998) 15

Stead v. United States, 67 F.Supp.2d 1064 (D.S.D. 1999) 24

Strickland v. Washington, 466 U.S. 668 (1984) 17, 19

Tankleff v. Senkowski, 993 F.Supp. 159 (E.D.N.Y. 1997) 16

Townsend v. Sain, 372 U.S. 293 (1963), *overruled on other grounds by Keeney v. Tamay-Reyes*, 504 U.S. 1 (1992) 22, 25, 26

United States v. Aiello, 814 F.2d 109 (2d Cir. 1987) 24

United States v. Amuso, 21 F.3d 1251 (2d Cir.), *cert. denied*, 513 U.S. 932 (1994) 2, 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994) 23

United States v. Casso, 843 F.Supp. 829 (E.D.N.Y. 1994) 3

United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) ..7, 19

United States v. Estrada, 849 F.2d 1304 (10th Cir. 1988) 23

United States v. Frazier, 18 F.3d 778 (9th Cir. 1994) 20

United States v. Friedland, 83 F.3d 1531 (3d Cir. 1996) 23

United States v. Gigante, 39 F.3d 42 (2d Cir. 1994), *as amended*, 94 F.3d 53 (2d Cir. 1996), *cert. denied by Aloi v. United States*, 522 U.S. 868 (1997) 3

United States v. Gotti, 771 F.Supp. 535 (E.D.N.Y. 1991) 3, 6

United States v. Levy, 25 F.3d 146 (2d Cir. 1994)..... 18

United States v. Magini, 973 F.2d 261 (4th Cir. 1992) 23

United States v. McGill, 11 F.3d 223 (1st Cir. 1993) 23

United States v. McMullen, 98 F.3d 1155 (9th Cir. 1996), *cert. denied*, 520 U.S. 1269 (1997).....24, 25

United States v. Morrison, 98 F.3d 619 (D.C. Cir.), *cert. denied*, 520 U.S. 1131 (1997) 24

United States v. Rodriguez, 929 F.2d 747 (1st Cir. 1991) 22

United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997) 24

TABLE OF AUTHORITIES – Continued

Page

Virgin Islands v. Weatherwax, 20 F.3d 572 (3d Cir. 1994) 22

West v. United States, 1997 WL 633477 (S.D.N.Y. 1997) 24

Wheat v. United States, 486 U.S. 153 (1988) 7, 18, 19, 20

Williams v. Calderon, 83 F.3d 281 (9th Cir.), *cert. denied*, 517 U.S. 1183 (1996) 14

Wood v. Georgia, 450 U.S. 261 (1981) 17, 25

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

28 U.S.C. § 2244(a) 21

28 U.S.C. § 2253 2

28 U.S.C. § 2253(c)(1)(B) 11

28 U.S.C. § 2253(c)(2) 14

28 U.S.C. § 2254(d) 20

28 U.S.C. § 2255 ..... *passim*

28 U.S.C. § 2255(1) 12

Federal Rule of Appellate Procedure 22 ..... 2, 11

Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 8 ..... 2, 21

United States Constitution Amendment V 1

United States Constitution Amendment VI .. 10, 17, 18, 19

TABLE OF AUTHORITIES – Continued

Page

LAW REVIEWS

A Dark Day for Habeas Corpus: Successive Petitions under the Antiterrorism and Effective Death Penalty Act of 1996, 40 Ariz. L. Rev. 1115 (Fall 1998) 16

Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C.A. § 2254, 110 Harv. L. Rev. 1868 (June 1997) 20

The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions, 111 Harv. L. Rev. 1578 (April 1998) 16

"Through a Glass Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 Colum. L. Rev. 1201 (October 1989) 18, 19

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York, denying Mr. Amuso's habeas corpus petition and sua sponte declining to issue a certificate of appealability, is reported at 10 F.Supp.2d 227 (E.D.N.Y. 1998) (Nickerson, J.). The order of the Second Circuit Court of Appeals denying Mr. Amuso's motion for issuance of a certificate of appealability and dismissing his appeal is unpublished. The order of the Second Circuit Court of Appeals denying Mr. Amuso's request for rehearing and suggestion for en banc consideration is unpublished. The opinion and orders are reprinted in the appendix at 1a-17a.

JURISDICTION

The district court judgment was entered on June 9, 1998. 1a. Mr. Amuso timely filed a notice of appeal on July 8, 1998 and moved on July 31, 1998 for issuance of a certificate of appealability. His motion was denied and his appeal dismissed on May 4, 1999. 13a. His timely petition for rehearing and suggestion for rehearing en banc was denied on September 29, 1999. 16a. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V: No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitution Amendment VI: In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

28 U.S.C. § 2253, reprinted at 18a.

28 U.S.C. § 2255, reprinted at 19a.

Federal Rule of Appellate Procedure 22, reprinted at 22a.

Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 8, reprinted at 24a.

STATEMENT OF THE CASE

Petitioner Vittorio Amuso was convicted by a jury and is serving a life sentence for violation of federal racketeering laws and tax evasion. He exhausted his direct appeal, *see United States v. Amuso*, 21 F.3d 1251 (2d Cir.), *cert. denied*, 513 U.S. 932 (1994), then filed a motion in the district court collaterally attacking his sentence pursuant to 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). His § 2255 motion is the subject of this proceeding.

Mr. Amuso's convictions arose out of the government's massive investigation of the five so-called Mafia crime families in the immediate New York metropolitan area and, more particularly, its investigation of John Gotti and the Gambino crime family he was believed to control. One of the charges brought against Mr. Amuso in the government's indictment alleged that he, purportedly as head of the Lucchese family, and his alleged "underboss" Anthony Casso, conspired with the heads of the other

families, including Mr. Gotti and the Gambino organization, to control the award of the New York City Housing Authority's window installation contracts. During the government's pre-indictment investigation of these charges, Anthony Casso was actively represented by Gerald Shargel, an attorney who in the past had represented many alleged Mafia defendants and who, in a related prosecution against John Gotti, was eventually disqualified from representing a co-defendant of Mr. Gotti's, Salvatore Gravano. *See United States v. Gotti*, 771 F.Supp. 535 (E.D.N.Y. 1991).

In May 1990, Mr. Amuso and thirteen other defendants, including Anthony Casso, were indicted on charges arising from the so-called "Windows" investigation. At the time of that indictment neither Anthony Casso nor the petitioner was arrested, because their whereabouts were unknown. The charges in that indictment eventually were tried, some defendants were convicted and their appeal to the Second Circuit Court of Appeals was unsuccessful. *See United States v. Gigante*, 39 F.3d 42 (2d Cir. 1994), *as amended*, 94 F.3d 53 (2d Cir. 1996), *cert. denied by Aloi v. United States*, 522 U.S. 868 (1997). Eventually, in July of 1991, Mr. Amuso was arrested, although Anthony Casso, Mr. Shargel's client, remained a fugitive until his apprehension in January, 1993. *See United States v. Casso*, 843 F.Supp. 829 (E.D.N.Y. 1994). In April of 1992, while Anthony Casso was at large and petitioner awaited trial on the outstanding charges, the grand jury returned a superseding indictment that incorporated the earlier Windows charges plus additional allegations that Mr. Amuso, as the alleged boss of the Lucchese crime family, was responsible for directing or

approving a series of murders committed by Anthony Casso and other Lucchese family members, essentially, on Mr. Amuso's "watch." He was also charged with a tax fraud conspiracy. *Amuso*, 21 F.3d at 1254.

Mr. Amuso's non-frivolous, non-successor application under § 2255 alleged a substantial violation of rights guaranteed under the Sixth Amendment. It asserted that Mr. Amuso's trial counsel, Gerald Shargel, had been hobbled by specific conflicts of interest about which Mr. Amuso had not been fully apprised and which he could not, and did not, knowingly and intelligently waive before proceeding to trial. The petition and accompanying memorandum of law were supported by affidavits from the lawyers, including Mr. Shargel, who, with the trial court's approval, had undertaken the obligation of informing Mr. Amuso about conflicts and risks. The affidavits of the attorneys fully confirmed Mr. Amuso's allegations.

The particular conflicts alleged in Mr. Amuso's petition arose from the long-standing attorney-client relationship between Mr. Amuso's trial counsel, Mr. Shargel, and Mr. Amuso's fugitive co-defendant Anthony Casso, and from the government's active investigation of Mr. Shargel for obstruction of justice arising from his alleged conflicted representation of defendants in organized crime prosecutions. In his trial representation of Mr. Amuso, attorney Shargel never urged the obvious defense that, whatever one might hold petitioner to have been within the Lucchese family, Anthony Casso was a renegade murderer who neither needed nor sought petitioner's

approval for his own criminal activity. Mr. Amuso specifically requested that the court set a hearing to complete his record on this claim of Sixth Amendment deprivation.

The trial judge had learned of these conflicts shortly before Mr. Amuso's trial. At a pre-trial conference on March 20, 1992, essentially on the eve of the scheduled six-week trial set to begin on May 4, 1992, the government advised the judge that there were some "conflicts" that arose in connection with Mr. Shargel's representation of petitioner. In the words of government counsel, "Mr. Shargel, as we understand it, has, for quite some time, represented a co-defendant in the superseding indictment, namely Mr. Anthony Casso, who is currently a fugitive." 28a. In fact, the government had been aware all along that Mr. Shargel viewed himself as representing Mr. Casso in connection with the investigation that led to the May 1990 Windows indictment of Mr. Casso and Mr. Amuso.

The government also advised the court on March 20, 1992 that Mr. Shargel "is a target, himself, personally, of a criminal tax and obstruction of justice investigation." Government counsel did not elaborate further for the record. 27a.

In fact, that two-fold investigation grew out of Mr. Shargel's relationship with so-called organized crime figures. A separate tax investigation was based on allegations of unreported income received from members of the Gambino organization. The obstruction of justice investigation was more nuanced. The government contended that Mr. Shargel, in his past representation of other organized crime figures, had sacrificed individual clients'

interests to the greater good of the larger criminal organizations by, among other things, recommending guilty pleas rather than trials. The government believed that Mr. Shargel had operated as "house counsel" for the Gambino organization, and as eventually endorsed and rephrased by the district judge who ruled on the application to disqualify Mr. Shargel in the prosecution of John Gotti, "the only conclusions to be drawn are that [Shargel and other lawyers] represent not merely an individual client, but the enterprise with which that individual is associated and receive instructions calculated to further the interests of that enterprise." *United States v. Gotti, supra,* 771 F.Supp. at 557 (Glasser, J.). Pointedly, before the May, 1990 Windows indictment was returned against Mr. Amuso, Anthony Casso and others, and while Mr. Shargel was representing the soon-to-be indicted Casso, Mr. Shargel reported to an associate of John Gotti that his ability to represent Gotti's underboss and likely co-defendant, Salvatore Gravano, would not be compromised by the impending indictment of Mr. Casso because Casso and Gravano would not be indicted together. 65a.

Mr. Amuso's § 2255 motion and memorandum of law asserted that he had not been fully advised of the existence or import of the conflicts to which the government had alluded at the pre-trial conference, and that he did not waive his right to conflict-free representation before he proceeded to trial with Mr. Shargel as his counsel.

Along with his motion and memorandum of law, he submitted the transcript of the pre-trial conference and

the hearing held later on March 20, 1992[1] (excerpted at 26a) and a series of affidavits (43a, 57a, 61a) describing the contemporaneous off-the-record advisements he received pursuant to the court's direction. The government never contested the critical facts presented in these affidavits.

The March 20, 1990 Transcript

Early in the pre-trial conference, government counsel listed an "inventory of conflicts" in open court. Counsel for the government identified but did not elaborate on the conflicts stemming from the "criminal tax and obstruction of justice investigation" of Mr. Shargel and from his representation, past and present, of "individuals who were involved in the Windows case or may factor in the Amuso trial," 28a, including:

- co-defendant Anthony Casso,
- two possible witnesses originally indicted with Mr. Amuso (one already acquitted, one convicted), and
- five other potential witnesses.

The trial court instructed Mr. Shargel to describe "each one" of his conflicts off the record to Martin Geduldig, an independent attorney who was not then present in the

---

[1] Mr. Amuso's papers describe this as a "Curcio hearing," after *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), a case which outlines the conflicts of interest advisement and waiver procedure prescribed for the courts in the Second Circuit. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *but see Wheat v. United States*, 486 U.S. 153 (1988).

courtroom. 32a. Based solely on the off the record conversation between Mr. Geduldig and Mr. Shargel, the court assumed that Mr. Geduldig would then be sufficiently informed to discuss the issues with Mr. Amuso off the record.

When the hearing resumed in the afternoon, the court engaged Mr. Geduldig and Mr. Amuso in a brief discussion of general categories of conflicts, such as counsel's representation of potential government witnesses and the government's investigation of counsel for tax evasion. 37a. The afternoon transcript showed that Mr. Amuso expressed his understanding of the conflicts as they were generally described by the court and asserted his desire to proceed to trial with Mr. Shargel as his attorney.

But the trial court did *not* list or discuss *each* of the conflicts identified by government counsel in the morning conference. Mr. Casso's name was not mentioned in the afternoon hearing; it had been uttered once at the very beginning of the morning conference and never mentioned again. The actual basis for the obstruction of justice investigation was not noted at either the morning conference or afternoon hearing. The trial judge did not call upon Mr. Amuso to waive the particular conflicts alleged in his petition, and in his brief waiver he does not mention them. 38a-40a.

Notably, despite the clear absence of any colloquy addressing the particular conflicts now in question, the district court relied on the transcript alone when it denied Mr. Amuso's § 2255 petition. It read the transcript comments of counsel and Mr. Amuso to mean that Mr.

Amuso knew about and did waive the two conflicts of interest that are the subject of the petition. 5a-6a.

The Affidavits

The sworn affidavits of Mr. Amuso's lawyers place the record comments of counsel and Mr. Amuso in context and confirm that the conflict waiver made by Mr. Amuso at the Curcio hearing could not possibly have encompassed these actual conflicts. The affidavits establish that Mr. Amuso received an incomplete advisement off the record between the morning and afternoon sessions in court. They establish that the attorneys discussed *some* of counsel's conflicts, but not *all* of them, with Mr. Amuso off the record.

Mr. Geduldig, the attorney the judge anticipated would advise Mr. Amuso off the record, averred that he was completely unaware of the particular conflicts that are the subject of Mr. Amuso's application – his affidavit asserts that when Mr. Shargel described for him the conflicts to be discussed with Mr. Amuso, (1) Mr. Shargel did not mention that he represented the co-defendant Anthony Casso during the government's investigation of Amuso, Casso and others leading to the indictment, nor did he mention Mr. Casso's name, and (2) neither Mr. Shargel nor the government attorneys explained that prosecutors believed he had obstructed justice in a related case by sacrificing some individual clients to protect others and the criminal organizations to which they allegedly belonged. 58a-59a. The affidavits of Mr. Geduldig, Mr. Amuso and Mr. Shargel together confirm that

no one discussed these particular conflicts or their implications with Mr. Amuso off the record before he returned to court in the afternoon, by which time he was expected to waive his Sixth Amendment right to conflict-free representation on the record.

The government offered no affidavits to refute the facts alleged in Mr. Amuso's papers. Rather, it submitted a memorandum of law in which it principally argued that the petition should be dismissed because it was not timely filed and, alternatively, that Mr. Amuso's "Curcio" waiver at the afternoon appearance was sufficient, even though it did not encompass Mr. Shargel's prior representation of Anthony Casso nor the investigation of Mr. Shargel for obstruction of justice. Ultimately, the government's memorandum conceded the two key factual predicates of Mr. Amuso's petition – the Sixth Amendment problems presented by (1) Mr. Shargel's unexplored relationship with Mr. Amuso's co-defendant, and (2) the fact that Mr. Shargel was under investigation not simply for possible tax violations, but for obstructing justice in the manner by which he represented his clients in organized crime cases.

Despite the factual issues presented by Mr. Amuso's § 2255 submission and the failure of the March 20 transcript to address those facts, the district court held no hearing. Instead, it waited six months and denied Mr. Amuso's petition with an opinion that ignored the factual record.

The court concluded that the matter of trial counsel's attorney-client relationship with Mr. Amuso's fugitive co-defendant was included in "all these matters" of *witness* representation that the independent counsel stated he

had discussed off the record with Mr. Amuso, and that Mr. Amuso waived that conflict on the record. 5a. The court pointed to Mr. Amuso's expressed desire to retain his attorney despite the government's investigation for tax evasion as proof that Mr. Amuso had waived his objections to proceeding with an attorney hampered by government investigation. 6a.

The factual findings are contradicted by the uncontested record of evidence in Mr. Amuso's papers and are clearly erroneous. The legal conclusions based on those unsupported findings are necessarily suspect. However, the court sua sponte refused to issue a certificate of appealability, thereby presumptively foreclosing appellate review of its factual and legal rulings. *See* 28 U.S.C. § 2253(c)(1)(B).

Petitioner nonetheless sought review by filing a timely notice of appeal, and pursuant to Federal Rule of Appellate Procedure 22(b), he filed a motion in the court of appeals on July 31, 1998 requesting issuance of a certificate of appealability. That motion, which was *unopposed* by the government, languished, unassigned and unresolved by the court of appeals. Finally, by notice dated April 15, 1999, the Clerk of Court responded to petitioner's counsel's letter of March 3 inquiring into the status of Mr. Amuso's application by issuing notice that the motion for a certificate of appealability would be added to the court's substantive motion calendar for May 4, 1999. On that date, the judges assigned to hear the motion (Winter, C.J, and Feinberg and Leval, C.JJ.) issued the following order: "IT IS HEREBY ORDERED that the motion be and it hereby is DENIED and the appeal DISMISSED." 15a. Mr. Amuso's timely petition for rehearing

and suggestion for en banc consideration was summarily denied without comment. 16a.

Mr. Amuso now seeks review of the denial of his certificate of appealability and leave to appeal the district court's denial of his § 2255 application. *See Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969 (1998).

JURISDICTION OF THE DISTRICT COURT

The district court had jurisdiction under 28 U.S.C. § 2255(1).

REASONS FOR GRANTING THE PETITION

I. When it enacted the AEDPA, Congress did not identify the threshold standards for resolving applications for certificates of appealability. This Court should expressly adopt the standards applied under the pre-AEDPA cases, as this will assure that federal prisoners like Mr. Amuso, who bring non-successor, non-frivolous § 2255 petitions presenting well-pleaded allegations of substantial conflicts of interest, receive the benefits of habeas corpus.

(A)

One of the lessons of this Court's decision in *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969 (1998), is that under the AEDPA the federal appellate courts must fully adjudicate the merits of prisoner applications for certificates of appeal in a way that makes their rulings amenable to meaningful review. In *Hohn*, a majority of this

Court ruled that an application for a certificate of appealability under the AEDPA is "a proceeding seeking relief for an immediate and redressable injury, i.e., wrongful detention in violation of the Constitution," the denial of which is reviewable in this Court by petition for certiorari. 524 U.S. at ___, 118 S.Ct. at 1972. While an application for this certificate presents a threshold question, the district and appellate courts deciding the issue are expected to resolve matters of substance: they must determine whether the claims for which appellate review is sought, and on which an application for a certificate of appealability is based, meet the legal standard for further review. *See id.*, 118 S.Ct. at 1975. On certiorari review the Supreme Court then "carr[ies] out [its] normal function of reviewing possible misapplications of law by the courts of appeals." *Id.*, 118 S.Ct. at 1977.

This Court cannot fulfill its function if the courts of appeal have not properly fulfilled theirs. Yet the AEDPA does not spell out the standards and procedures that the lower federal courts are expected to apply to these applications, leaving the matter open to uncertain, and worse, as was done here, unarticulated appellate interpretation.

Mr. Amuso's case presents this problem at its most extreme. The Second Circuit Court of Appeals denied his long-pending, unopposed motion on the day the motion was submitted to it, without comment or reference to any standard whatsoever, thereby defying review. This Court can and should correct this manifest injustice, and in the process issue badly needed direction to the federal courts of appeal.

(B)

As amended by the AEDPA, 28 U.S.C. § 2253(c)(2) states that in a proceeding under § 2255, an appeal may proceed only upon issuance of a certificate of appealability, which "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Congress discarded the "certificates of probable cause" for appeal required under the pre-AEDPA version of the statute. The shift in labels may be significant, and at least one circuit court of appeals has indicated that the AEDPA materially modified the standard. *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir.) (in dicta, court declares that "the standard for obtaining a certificate of appealability under the Act is more demanding than the standard for obtaining a certificate of probable cause" under prior law), *cert. denied*, 517 U.S. 1183 (1996); *cf. Lowell v. Prunty*, 91 F.3d 1358, 1359 (9th Cir. 1996) (declining formally to "decide" whether the new standard is "more demanding"), *cert. denied*, 520 U.S. 1158 (1997). The better view, and the one this Court should apply, is that the "substantial showing" requirement remains unaltered by the AEDPA. *E.g., Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997) (holding that the old and new standards are "materially identical" notwithstanding the "marginal" variance in the language); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir.) (holding that the standard remains the same), *cert. denied*, 520 U.S. 1224 (1997); *Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996) (AEDPA codified standard announced by the Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880 (1983)), *cert. denied*, 520 U.S. 1107 (1997); *Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir. 1996) (same), *cert.*

denied, 519 U.S. 1081 (1997), *overruled on other grounds by United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997); *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996).

Applying the pre-AEDPA standard, the burden of persuasion for issuance of a certificate, while not insubstantial, should not be onerous. A petitioner need not show that he should prevail on the merits.[2] *Nelson v. Walker*, 121 F.3d 828, 832 (2d Cir. 1997). "Rather, a petitioner who has been denied relief in a district court 'must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.' " *Lozada v. Deeds*, 498 U.S. 430, 432 (1991), quoting *Barefoot*, 463 U.S. at 893 n.4 (emphasis in original). Doubts therefore are resolved in favor of granting certificates of appealability. *E.g., Sonnier v. Johnson*, 161 F.3d 941, 944 (5th Cir. 1998) (resolving doubts in AEDPA case in defendant's favor);

---

[2] At least one circuit holds, in a non-conflict case, that "[t]o prevail under § 2255 [in a pre-AEDPA filing], a defendant must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or jury's verdict," adopting the harmless error standard applied to collateral review of *state* court convictions in the wake of this Court's decision in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Schledwitz v. United States*, 169 F.3d 1003, 1011 (6th Cir. 1999). Since conflict of interest claims are not susceptible to the harmless error analysis, *Strickland v. Washington*, 466 U.S. 668, 692-93, (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *Holloway v. Arkansas*, 453 U.S. 475, 487-88 (1978), this Court need not now decide whether to extend the rule of *Brecht* to § 2255 applications under the AEDPA.

Tankleff v. Senkowski, 993 F.Supp. 159 (E.D.N.Y. 1997) (despite bad facts, the presumed correctness of decisions below and the questionable value of unconstitutionally withheld evidence, court deciding whether to grant certificate of appealability on non-disclosure issue gives "close calls" to the defendant); *cf. Moore v. Reynolds*, 153 F.3d 1086, 1095 (10th Cir. 1998) (appellate court exercises "an abundance of caution" and grants certificate of probable cause on ineffective counsel claim for which the district court mistakenly applied the AEDPA and denied a certificate of appealability), *cert. denied*, 119 S.Ct. 1266 (1999).

Some commentators have opined that Congress intended the provisions of the AEDPA to limit access to the writ of habeas corpus, *see, e.g.*, Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 Harv. L. Rev. 1578 (April 1998) ("With the passage of the [AEDPA of 1996], Congress dramatically circumscribed the Great Writ of Habeas Corpus."); Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 Ariz. L. Rev. 1115 (Fall 1998) ("In enacting the AEDPA, Congress has gone too far in restricting access to the writ of habeas corpus. What was purportedly intended to limit federal claims so as to avoid 'abuse of the writ' will in practice do much more."). But any suggestion that a more restrictive standard will apply to the issuance of certificates of appealability than was applied to certificates of probable cause is at odds with this Court's majority opinion in *Hohn*, which

imposes limits on the appellate courts' authority under the AEDPA to summarily limit access to the writ.

Viewed, then, against the backdrop of *Hohn* and the pre-AEDPA case law, the constitutional merit of Mr. Amuso's application and his concomitant right to pursue review in the appellate courts are irrefutable. His non-successor § 2255 application presented well-pleaded and factually supported allegations of a violation of rights guaranteed by the Sixth Amendment: the trial court never inquired into the substantial attorney conflicts of interest described in his papers; those conflicts were not addressed by any waiver elicited by the court; and those conflicts resulted in a lapse in trial counsel's representation. In addressing the conflict waiver issues and then refusing to issue a certificate of appealability, the district court applied outdated legal standards and rewrote the factual record.

(C)

Among Sixth Amendment claims alleging ineffective assistance of counsel, those that assert that counsel labored under a conflict of interest stand apart as the most unseemly and presumptively prejudicial. *Strickland v. Washington*, 466 U.S. 668, 692-93 (1984), citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980); *see* text accompanying fn.2, *supra*. This Court has directed that trial courts apprised of even the possibility of a particular conflict of interest must investigate the facts and details of the attorney's interests, to determine the scope of that conflict or whether the conflict exists at all. *Wood v. Georgia*, 450 U.S. 261, 272-273 (1981); *Cuyler*, 446 U.S. at 347; *Holloway v.*

Arkansas, 435 U.S. 475, 484 (1978). These obligations devolve upon the courts, and not on defense counsel or government lawyers, because trial courts have an "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment." *Wheat v. United States*, 486 U.S. 153, 161 (1988). If the court ignores a possible conflict entirely, reversal is automatic. *Cuyler*, 446 U.S. at 347; *Holloway*, 435 U.S. at 488; *see United States v. Levy*, 25 F.3d 146, 154 (2d Cir. 1994) (applying rule to cases in which the court "knows or reasonably should know a particular conflict exists.").

The question of what the trial judge's role must be in conflict of interest cases has lurked in the background of this Court's decisions concerning the scope of a criminal defendant's right to the undivided loyalty of his attorney, *see* Bruce A. Green, *"Through a Glass Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201 (October 1989). The judge's role has evolved through the years. With *Wheat*, this Court revised its traditional view that trial attorneys will uphold the general ethical standards of the legal profession and disavowed *Cuyler's* reliance on defense counsel to avoid potential conflicts to which his client has not consented. *Wheat* concluded that when it comes to securing knowing, voluntary and intelligent waivers of the Sixth Amendment's right to conflict-free counsel, trial counsel cannot be relied upon to fully advise the client of the risks. Green, *"Through a Glass Darkly,"* at 1223-25, 1227; *see Wheat*, 486 U.S. at 162 ("Nor is it amiss to observe that the willingness of an attorney to obtain such a waiver from his clients may bear an inverse relation to

the care with which he conveys all the necessary information to them.").

One of the essential lessons of *Wheat* is that the Sixth Amendment demands that trial judges assume the active role in advising criminal defendants of the risks of proceeding with conflicted counsel. In practical effect, *Wheat* repudiates the hands-off approach to conflict waivers of *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), whose interpretation of *Cuyler* and *Strickland* informed the protocol followed by the trial court in Mr. Amuso's case and was approved on collateral review. The Second Circuit in *Curcio* prescribed the following specific steps for a trial judge to take when he becomes aware of a potential conflict:

> [T]he court should advise the defendant of his right to separate and conflict-free representation, instruct the defendant as to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision.

680 F.2d at 890. This "circumspect" inquiry, Green, *"Through a Glass Darkly,"* 89 Colum. L. Rev. at 1232, does not satisfy *Wheat's* expectation of a "probing inquiry to garner all of the facts relevant to ascertaining whether there is a 'serious potential for conflict,' " so that the court's decision to accept a waiver of the Sixth Amendment's protection is fully "informed," 486 U.S. at 164, and not unduly speculative.

Given *Wheat* – controlling authority not even cited in the district court's opinion denying Mr. Amuso's § 2255 petition, 6a, – every aspect of the district court's handling of the conflict and waiver questions posed by Mr. Amuso's application would be "debatable, among jurists of reason," *Lozada*, 498 U.S. at 432, on review. The district court that denied Mr. Amuso's application resolved mixed questions of law and fact by reference to a discredited legal standard. It made clearly erroneous factual findings that the twin conflicts alleged in Mr. Amuso's papers – conflicts that the trial court ignored and that defense counsel never mentioned to Mr. Amuso before the case proceeded to trial – were addressed by Mr. Amuso's waiver of other conflicts. Both the legal and factual findings would be susceptible to de novo review if the case proceeded to appeal. *E.g., Edens v. Hannigan*, 87 F.3d 1109, 1113 (10th Cir. 1996) (conflict of interest claim brought under § 2255 presents mixed question of fact and law, and questions of law are reviewed de novo while fact questions are reviewed for clear error); *Familia-Consoro v. United States*, 160 F.3d 761, 764-65 (1st Cir. 1998) (affirmatively adopting the de novo standard of review for claims of conflict of interest brought under § 2255, noting this to be the rule "in virtually every other circuit in the land," and collecting cases); *United States v. Frazier*, 18 F.3d 778, 781 (9th Cir. 1994) (denial of § 2255 motion asserting conflict of interest reviewed de novo). *But see* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C.A § 2254*, 110 Harv. L. Rev. 1868, 1872-79 (June 1997) (recognizing that while this Court has yet to rule on the meaning and applicability of the new § 2254(d) standards of review, the "most

extreme" lower court rulings hold that the AEDPA has eliminated de novo review of legal and mixed question determinations in state collateral review cases). Mr. Amuso's petition for relief under § 2255, and his motion for a certificate of appealability, plainly satisfies the threshold requirements of *Lozada*.

II. Because the AEDPA does not address the issue, district courts must be directed to read the hearing provision under § 2255 broadly, to retain the promise of *Townsend v. Sain* and provide for hearings to complete the factual record, so that non-frivolous, non-successor petitions will continue to receive full and fair judicial review.

(A)

Section 2255 provides that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court *shall* . . . grant a prompt hearing thereon." (Emphasis added.) While Rule 8(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts directs the district judge to determine whether to hold an evidentiary hearing, neither the rule nor the Advisory Committee Note to it, nor any other rule, provides the district court with guidance in making the determination. This Court has yet to interpret the hearing provision of § 2255 or Rule 8(a) under the AEDPA.

Because one of the AEDPA's goals is to limit federal prisoners to a single collateral review of their sentences, *see* 28 U.S.C. § 2244(a), district courts should be directed to read the hearing provision to favor hearings on facially

non-frivolous, non-successor filings where dispositive facts are subject to differing reasonable interpretations. Only by expanding the record, particularly in cases asserting attorney conflicts of interest, can courts assure the continued vitality of the Great Writ.

(B)

Townsend v. Sain, 372 U.S. 293, 312 (1963), *overruled on other grounds by Keeney v. Tamay-Reyes*, 504 U.S. 1 (1992), states that a hearing must be held in habeas cases where "the facts are in dispute." *See Machibroda v. United States*, 368 U.S. 487, 495-96 (1962) (the failure to hold a hearing in the face of detailed factual allegations concerning matters within the affiant's personal knowledge and which, if true, would afford a basis for relief, is error).

Under pre-AEDPA jurisprudence, when matters not of record were essential to determining the merits of the constitutional claim raised by a § 2255 petition, hearings were required. *See Sanders v. United States*, 373 U.S. 1, 19-20 (1963) (petitioner entitled to hearing on claim that he was under influence of drugs when he waived indictment and pleaded guilty to charges in information, even though same judge presided over waiver). *Compare United States v. Rodriguez*, 929 F.2d 747, 752 (1st Cir. 1991) (per curiam) (petitioner entitled to evidentiary hearing on allegation that counsel, due to conflict of interest, failed to inform petitioner of government's plea offer); *Virgin Islands v. Weatherwax*, 20 F.3d 572, 573 (3d Cir. 1994) (petitioner entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to petitioner would entitle him to relief);

United States v. Magini, 973 F.2d 261, 264-65 (4th Cir. 1992) (petitioner entitled to evidentiary hearing when motion presented colorable claim of conflict of interest and material facts beyond the record are in dispute); *Nichols v. United States*, 75 F.3d 1137, 1145-46 (7th Cir. 1996) (petitioner entitled to evidentiary hearing on claim of ineffective assistance of counsel when evidence inconclusive on issue); *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994) (petitioner entitled to evidentiary hearing on claim of ineffective assistance of counsel unless claim inadequate on its face or if records conclusively refute factual assertions of claim); *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994) (accepting the truth of the factual allegations, evidentiary hearing required unless § 2255 motion, files, and trial record "conclusively show" petitioner entitled no relief), *and United States v. Estrada*, 849 F.2d 1304, 1306-07 (10th Cir. 1988) (petitioner entitled to evidentiary hearing on claim of involuntary guilty plea when record "less than conclusive" on issue) *with United States v. McGill*, 11 F.3d 223, 225 (1st Cir. 1993) (no evidentiary hearing allowed where defendant "mount[s] no serious challenge on the facts"); *United States v. Friedland*, 83 F.3d 1531, 1542-43 (3d Cir. 1996) (no evidentiary hearing required when undisputed facts showed petitioner not entitled to reduction of sentence); *Mathews v. United States*, 11 F.3d 583, 584-85 (6th Cir. 1993) (no evidentiary hearing required when § 2255 petition raised no issues presenting factual disputes); *Prewitt v. United States*, 83 F.3d 812, 819-20 (7th Cir. 1996) (no evidentiary hearing required on claim of intentional, pre-indictment delay when petitioner offered only "conclusory allegations" without supporting facts); *Payne v. United States*, 78 F.3d

343, 347 (8th Cir. 1996) (no evidentiary hearing required when, after de novo review, claims appear to be "inadequate on their face"); *United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996) (no evidentiary hearing required when petitioner could not allege specific facts which would entitle relief), *cert. denied*, 520 U.S. 1269 (1997); *United States v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997) (no evidentiary hearing required when record conclusively shows petitioner not entitled to relief); *and United States v. Morrison*, 98 F.3d 619, 624-26 (D.C. Cir.) (no evidentiary hearing required when ineffective counsel claim is "speculative" and does not involve information outside record or judge's memory), *cert. denied*, 520 U.S. 1131 (1997).

Lower federal courts interpret § 2255's hearing requirement in various ways. However, most continue to apply pre-AEDPA standards akin to the standard for summary judgment. *See, e.g., Lamberti v. United States*, 22 F.Supp.2d 60, 70 (S.D.N.Y. 1998) (Kaplan, J.) (hearing is required under the AEDPA "only when the papers on the motion, measured by the same standards of competence and admissibility applicable to motions for summary judgment, reveal the existence of a genuine issue of material fact," applying *United States v. Aiello*, 814 F.2d 109, 113 (2d Cir. 1987), a pre-AEDPA case); *West v. United States*, 1997 WL 633477, *5 (S.D.N.Y. 1997) (Stanton, J.) (hearing required when claims are "plausible" and petitioner supports the claims by "setting forth specific facts which he or she is in a position to establish by competent evidence," citing pre-AEDPA circuit law); *Stead v. United States*, 67 F.Supp.2d 1064, 1073 (D.S.D. 1999) (Kornmann,

J.) (interpreting the AEDPA's hearing requirement by reference to *Townsend v. Sain* and pre-AEDPA circuit authority, holding that an evidentiary hearing need not be held "(1) if the defendant's allegations, accepted as true, would not entitle him to relief; or (2) the allegations cannot be accepted as true because they are inherently incredible or conclusions rather than statements of fact [; or (3)] where the files and records of the case conclusively show that a [defendant] is not entitled to relief.") (citations and internal citations omitted); *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998) ("To earn the right to a hearing, therefore, Appellant was required to allege specific facts which, if true, would entitle him to relief," quoting *McMullen*, 98 F.3d at 1158, a pre-AEDPA case), *cert. denied*, 119 S.Ct. 1777 (1999).

How that summary judgment-style standard applies to *non-conflict* cases may be affected by the standard the district courts choose to apply in deciding the merits of the particular claim: this Court has yet to decide which of the "harmless error" standards of review must be met to prevail on a collateral attack brought under § 2255 of the AEDPA. *See discussion* at fn.2, *supra*.

Conflict of interest claims do not present this question, however, because conflict claims are never reviewed for harmless error. "[T]o assess the impact of a conflict of interests on the attorney's options, tactics and decisions . . . would be virtually impossible. Thus, an inquiry into a claim of harmless error would require, unlike most cases, unguided speculation." *Holloway*, 435 U.S. at 491; *Wood*, 450 U.S. at 272 n.18 (*Cuyler* "mandates reversal when the trial court has failed to make an inquiry even

though it 'knows or reasonably should know that a particular conflict exists.' "). For purposes of the hearing provision of § 2255, conflict of interest claims must be assessed on their facts.

Mr. Amuso had the facts. He presented credible non-record evidence to support his well-pleaded claim that the trial judge totally ignored attorney conflicts of interest about which Mr. Amuso was not apprised before trial. He proved his entitlement under *Townsend v. Sain* to a hearing on his § 2255 claim.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

DATED: December 23, 1999

Respectfully submitted,

PAUL B. BERGMAN, ESQ.
PAUL B. BERGMAN, PC
950 Third Avenue
New York, NY 10022
Telephone: (212) 355-7711

RACHEL A. BELLIS, ESQ.
HADDON, MORGAN & FOREMAN, PC
150 East 10th Avenue
Denver, CO 80203
Telephone: (303) 831-7364

MICHAEL E. TIGAR, ESQ.
Counsel of Record
THE TIGAR LAW FIRM
1215 Seventeenth Street N.W.
Washington, D.C. 20036
(202) 467-2765

Counsel for Petitioner

APPENDIX

UNITED STATES of America, Respondent,

v.

Vittorio AMUSO, Petitioner.

No. 97 CV 2050.

United States District Court,
E.D. New York.

June 4, 1998.

Zachary W. Carter, United States Attorney, (Daniel S. Dorsky, Assistant United States Attorney, of counsel), Brooklyn, NY, for respondent.

Haddon, Morgan & Foreman, P.C., Michael E. Tigar, Denver, CO, Paul B. Bergman, New York, NY, for petitioner.

MEMORANDUM AND ORDER

NICKERSON, District Judge.

On April 22, 1997 petitioner Vittorio Amuso filed this petition for habeas corpus pursuant to 28 U.S.C. § 2255, claiming his trial counsel, Gerald Shargel, was ineffective.

On June 15, 1992, petitioner, then the Boss of the Luchese Organized Crime Family, was found guilty by a jury on all fifty-four counts of a superseding indictment charging him with violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(a) and (d), as well as extortion, tax fraud, and substantive and conspiracy violations constituting RICO predicate acts.

The government proved beyond any reasonable doubt all fifty-four counts, including the charges that petitioner was guilty of ordering the murder of nine persons, namely, Sorecho Nalo, Thomas "Red" Gilmore, Michael Pappadio, John Petrucelli, John Morrisey, Bruno Facciola, Michael Salerno, Larry Taylor, and Al Vioconti; attempting to murder or conspiring to murder another five persons, namely, Anthony Accetturo, Anthony Accetturo, Jr., Joseph La Morte, Joseph Martinelli, and Peter Chiodo; and committing extortion, bribery, and tax fraud. As befitted a Boss of a Crime Family, petitioner did not personally inflict the death wounds on the murder victims but ordered others to carry out the crimes.

This Court sentenced petitioner on October 9, 1992 to life imprisonment, a fine, and a special assessment. The Court of Appeals for the Second Circuit affirmed on April 20, 1994. *United States v. Amuso*, 21 F.3d 1251 (2d Cir.), cert. denied, 513 U.S. 932, 115 S.Ct. 326, 130 L.Ed.2d 286 (1994). The opinion by the Court of Appeals summarizes in some detail the evidence at trial. *Id.* at 1254-57.

I

The government says that the petition was not filed within time limits prescribed by 28 U.S.C. § 2255. The Antiterrorism and Effective Death Penalty Act of 1996 (the Act), Pub.L. No. 104-132, 110 Stat. 1214, 1220 (1996), amended 28 U.S.C. § 2255 to require that a habeas petition be filed no later than one year after the date on which a judgment of conviction becomes final. The Act became effective on April 24, 1996.

Petitioner filed the application for habeas corpus on April 22, 1997, two days less than a year after the effective date of the Act.

In *Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir.1997), the Court of Appeals said in dicta that in circumstances where a petitioner has had several years to contemplate bringing a habeas corpus petition, it saw "no need to accord a full year after the effective date of the Act." A petitioner must be accorded a "reasonable time" to file a petition, a standard not to be "applied with undue rigor." It is true that Amuso waited to file his petition for about a year and six months after the Supreme Court denied certiorari. But under the circumstances, the Court deems the petition filed within a reasonable time.

II

This Court, after being advised that Mr. Shargel had potential conflicts of interest, held a hearing on March 20, 1992, two months before the trial, to satisfy the requirements set forth in *United States v. Curcio*, 680 F.2d 881 (2d Cir.1982). Amuso, Mr. Shargel, the government attorneys, and later another defense attorney, Martin Geduldig, attended.

Mr. Shargel opened the hearing by stating that he and the government had "discussed several potential conflicts of interest that Mr. Amuso is prepared to waive." He advised the Court that Mr. Geduldig was "an independent counsel", that his participation would "ameliorate some of these conflicts", but that, in any event, "even absent independent counsel, Mr. Amuso [had] been fully apprised," and Mr. Shargel had "discussed with him

in detail all of these potential conflicts, and he is prepared to waive them."

Assistant United States Attorney Gregory O'Connell described the "inventory of conflicts." Mr. Shargel (1) was personally a target "of a criminal tax and obstruction of justice investigation," (2) had "for quite some time, represented a co-defendant in the superseding indictment, namely, Anthony Casso," the Underboss of the Luchese crime family, who was "currently a fugitive," (3) was through his office representing Dennis DeLucia, who had been convicted in an earlier case in which Amuso had been indicted, (4) was representing Michael Vuolo, a potential witness in the case, (5) had represented Sammy Gravano, the Underboss of the Gambino Crime Family, who was then, with the advice of other counsel, cooperating with the government in the *Gotti* case, (6) through his office had represented Joseph Zito, formerly a co-defendant of Amuso, (7) had seen Peter Savino, a potential witness in the case, about a grand jury matter, and (8) had been approached by Barbara Amuso, Amuso's wife, and Lillian Casso, Casso's wife, who had been subpoenaed and had a "longstanding relationship" with Mr. Shargel.

Mr. Shargel explained that he would represent Mrs. Amuso only if it would not exacerbate the conflict problem and that if the potential witnesses were called Mr. Geduldig would conduct the cross-examination. Mr. Shargel added that from what he had read in the transcript of the John Gotti trial then ongoing, Gravano had not waived his attorney client privilege. Mr. Shargel affirmed that he had made certain not to share any information he had learned from Gravano with Amuso or anyone on the trial team.

Mr. O'Connell confirmed his understanding that Mr. Shargel would insure that Amuso had been properly advised and counseled as to the foregoing conflicts by having Mr. Geduldig, who posed no conflicts, review with Mr. Amuso each of the conflicts and "their ramifications."

The Court then addressed a few preliminary remarks to Amuso and emphasized that Amuso should discuss the conflicts with Mr. Geduldig, and that he was entitled "to a lawyer that doesn't have any of the problems" that had been discussed. Amuso acknowledged that he understood.

Later the same day, Amuso and Messrs. Shargel, Geduldig, O'Connell, as well as Mr. Alan Futerfas, an associate of Mr. Shargel, returned to the courtroom. Mr. Geduldig, who had an opportunity to talk to Amuso at length, reported that he and Amuso had discussed the three categories in which Mr. Shargel had a conflict or a potential conflict, namely, that (1) Mr. Shargel was under investigation, (2) several persons whom Mr. Shargel had represented were potential witnesses, and (3) several persons whom Mr. Shargel had represented were not potential witnesses but presented potential conflicts.

Most prominent in the third category was Anthony Casso, the Underboss of the Luchese crime family. He had become a fugitive in company with Amuso, and was a co-defendant in the superseding indictment. Mr. Shargel was not representing Casso in the pending case.

The Court asked Mr. Geduldig whether he had "discussed all these matters" with Amuso. Mr. Geduldig said he had done so and added that if any witness previously

represented by Mr. Shargel did testify and did not waive the privilege, Mr. Geduldig would conduct the cross-examination. He confirmed that Amuso had no objections to the procedure.

The Court then elicited from Amuso that he had an adequate opportunity to discuss the potential conflicts with Mr. Geduldig, had no problem with the fact that Mr. Shargel was under government investigation, and understood the conflict concerning people whom Mr. Shargel had represented in the past who might become witnesses or who might have information useful in Amuso's defense. Amuso informed the Court that "I still want him [Mr. Shargel] as my attorney."

Amuso's present lawyers say the Court was derelict in (1) conducting the hearings as to Mr. Shargel's conflicts, which Amuso did not adequately waive and (2) failing to disqualify Mr. Shargel because some of the conflicts were "unwaiveable as a matter of law."

III

The legal standard that this Court follows in assessing Amuso's claims has been set forth by the Court of Appeals for the Second Circuit, most recently in *United States v. Stantini*, 85 F.3d 9 (2d Cir.) cert. denied, ___ U.S. ___, 117 S.Ct. 498, 136 L.Ed.2d 390 (1996). A claim that counsel is conflicted is in essence a claim of ineffective assistance of counsel. Generally, in order to succeed on such a claim, a defendant must show prejudice, *Strickland v. Washington*, 466 U.S. 668, 681, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), which will be presumed if the defendant has established (1) that counsel actively represented

a conflicting interest and (2) that an actual conflict of interest adversely affected counsel's performance. *Strickland*, 466 U.S. at 681, 104 S.Ct. at 2064.

Even if a defendant establishes an actual conflict, he must make a further showing of a lapse of representation resulting from the conflict. To prove such a lapse, he must demonstrate that some "plausible alternative defense strategy or tactic" could have been, but was not, pursued due to counsel's other loyalties or interests. *Id.*

In their papers in support of Amuso's petition, his lawyers argue that Mr. Shargel had an actual conflict because he (1) had previously represented potential witnesses "who played a role" in the government's case against Amuso, (2) was the attorney for Casso, and (3) was the subject of a government investigation arising out of his acting as "house counsel" for the Gambino Crime Family.

IV

Petitioner's claim that former clients of Mr. Shargel "played a role" in the government's case against him, creating a conflict, has no merit. The government called at trial no live witnesses that Mr. Shargel had previously represented. There was thus no occasion for any "independent counsel" to conduct cross examination.

The claim by Amuso's lawyers that Mr. Shargel "was" then the attorney for Casso is also misleading. Mr. Shargel filed no appearance for Casso in the case, nor could he represent Casso in the case unless Amuso waived the conflict. It is hardly surprising that in the past

the Boss and the Underboss of the same tightly run Luchese Crime Family had been represented by the same attorney. In any event, at the hearing Amuso waived any objection to Mr. Shargel's prior representation of Casso.

Amuso's attorneys contend that the Court should have alerted Amuso to the possibility that Mr. Shargel might have a motive to refrain from pursuing a "plausible" strategy, that is, blaming Casso alone for all the crimes charged in the indictment of Amuso. The putative motive attributed by the attorneys to Mr. Shargel is an alleged hope for the future that, if Casso were ever caught, Mr. Shargel could perhaps represent him in a subsequent trial and collect still another attorney's fee.

The proof at trial showed that Amuso was no puppet ruler, and certainly not innocent in the ways of organized crime. He was an experienced and intelligent man who had worked his way to the top of a dangerous business. His relationship with Casso, whom he had appointed first as Consigliere and later as Underboss, was a close one. They were in each other's company almost constantly. With Casso as one of his chief weapons, Amuso jealously guarded his powers and privileges as Boss of the Luchese Crime Family.

It is hard to believe that even a minimally competent lawyer would have adopted any such suicidal strategy as trying to shift all blame to Casso. To have done so could not conceivably have exculpated Amuso. Indeed, given the relationship between the two, it might well have powerfully suggested Amuso's guilt. Moreover, it would have seriously undermined the most promising line of defense of attacking the credibility of the cooperators

testifying for the government. Mr. Shargel exploited that possibility with great skill, making proficient use of the many sordid and vicious crimes these witnesses had committed.

The evidence established without any doubt that Amuso was the Boss and Casso the loyal Underboss, appointed by and holding office at the pleasure of Amuso. Amuso gave orders to Casso, not the other way around. Only Amuso, not Casso, could give permission to commit a murder. To have pretended that Amuso was some kind of figurehead who supinely allowed Casso to usurp his powers was no plausible strategy.

Amuso now says that at trial he "wanted" Mr. Shargel "to show that Casso acted on his own" without Amuso's direction or approval, but that Mr. Shargel was extremely "reluctant" to adopt such a strategy. Amuso does not suggest how Mr. Shargel was suppose to "show" Casso acted on his own. The witnesses testified quite to the contrary. When Amuso barked, Casso arranged for others to bite. Whatever qualities the attorneys now attribute to Mr. Shargel, they do not accuse him of irrationality or inexperience. If in fact Amuso had suggested that Mr. Shargel try to show that Casso alone was responsible for all the charged crimes, doubtless Mr. Shargel would have been "reluctant" to follow the suggestion and would have explained to his client how foolhardy such a strategy would be.

V

The other argument of Amuso's attorneys is headed by the statement that Mr. Shargel was a "witness to

events presented" at Amuso's trial, and "participated in related crimes." The attorneys cite the proposition of law that "when an attorney is implicated in the crimes of his or her client," there is a per se violation of the client's Sixth Amendment rights. One might think from this wording that the attorneys had discovered and were revealing the sensational news that Mr. Shargel had a hand in some of the murders or perhaps one of the extortions of which Amuso was convicted.

The attorneys' briefs demonstrate that what they regard as a showing that Mr. Shargel "participated in related crimes" or was "implicated in the crimes" of his client are circumstances that had nothing whatsoever to do with anything Mr. Shargel did or witnessed with respect to Amuso or the Luchese Crime Family. The attorneys' argument is as follows.

Salvatore (Sammy the Bull) Gravano, the then Consigliere of the Gambino Crime Family, was indicted in the notorious "*Gotti* case" along with John Gotti and Frank Locascio, respectively the Boss and Underboss of that family. Mr. Shargel represented Gravano, Mr. Bruce Cutler represented Gotti, and Mr. John Pollok represented Locascio. On motion of the government, Judge I. Leo Glasser disqualified all three attorneys. Among the reasons for the disqualifications was that various tapes made of Gotti's conversations revealed that all three had received "benefactor payments" from Gotti to represent other Gambino members and had in effect become "house counsel" for the Gambino Crime Family. The voices of Mr. Shargel and Mr. Cutler were heard on some of the tapes.

All this was revealed publicly and in detail on August 1, 1991 by Judge I. Leo Glasser in his opinion in *United States v. Gotti*, 771 F.Supp. 552, 560 (E.D.N.Y.1991), aff'd, 6 F.3d 924 (2d Cir.1993), cert. denied, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994). The published opinion received wide publicity and was printed in full in the New York Law Journal on August 5, 1991.

The revelations led to the criminal tax and obstruction of justice investigation of Mr. Shargel, the very investigation that Amuso considered when he stated to this Court that he still wished Mr. Shargel to represent him. The investigation did not concern Amuso or the Luchese Crime Family. Neither the investigation nor the tapes related to any murder, extortion, fraud, or other crime charged against Amuso. Yet Amuso's attorneys say that because two short excerpts from the many hours of the "*Gotti* tapes," excerpts having nothing to do with any wrongdoing by Mr. Shargel or with the disqualification of the three attorneys, were admitted in evidence at Amuso's trial, Mr. Shargel somehow "became a witness to events presented" at the trial. What he witnessed and could have testified to is not even implied.

The excerpts do not mention Mr. Shargel. He is not a party to the recorded conversations, which do not have the remotest pertinence to anything he did or said. It is not suggested that he was "house counsel" for the Luchese Crime Family or that he received "benefactor" payments from Amuso for representing other members of that family. While the excerpts were arguably relevant to the question of whether the Luchese Crime Family was an enterprise (a matter hardly subject to dispute) and engaged in gambling, there is no hint that Mr. Shargel's

representation of Amuso bore in the slightest on either of those matters.

VI

The Court has considered all of the arguments advanced in support of the petition and finds them to be without merit.

The petition for habeas corpus is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253; *see Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir.1996).

So ordered.

T 1080
6/95

MANDATE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).
(Filed July 31, 1998)

VITTORIO AMUSO,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee
Use short title

98-2614
Docket Number

NOTICE OF MOTION

state type of motion
for Cert. of Appealability
28 U.S.C. ¶ 2253(c)(1)(B)

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Michael E. Tigar, Esq.
4801 Massachusetts Ave., NW
Washington, D.C. 20016

Paul B. Bergman, Esq.
950 Third Avenue
New York, NY 10022

Has consent of opposing counsel:

A. been sought?	[ ] Yes	[X] No
B. been obtained?	[ ] Yes	[X] No
Has service been effected?	[X] Yes	[ ] No
Is oral argument desired?	[X] Yes	[ ] No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [ ] Yes [X] No

B. by firm date of argument notice? [ ] Yes [X] No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

Hon. Eugene R. Nickerson U.S.D.J. (EDNY)

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Zachary Carter, Esq.
United States Attorney, EDNY
One Pierrepont Plaza
Brooklyn, NY 11201

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

Brief statement of the relief requested:

Issuance of a Certificate of Appealability from the denial in the district court of the Petitioner-Appellant's application for habeas corpus relief.

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Paul B. Bergman
Signed name must be printed beneath
Paul B. Bergman

Appearing for: *(Name of party)*

VITTORIO AMUSO

Date

July 31, 1998

Appellant or Petitioner:
[ ] Plaintiff [ ] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

ORDER

BEFORE HON. RALPH K. WINTER, Chief Judge, HON. WILFRED FEINBERG and HON. PIERRE N. LEVAL, C.JJ.

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED and the appeal DISMISSED.

(Filed May 4, 1999)

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk
by /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney
Issued as Mandate

May 4, 1999
Date

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-nineth day of September one thousand nine hundred and ninety-nine.

Amuso,

Petitioner-Appellant,

v.

USA

Respondent-Appellee.

Dkt No: 98-2614

(Filed Sept. 29, 1999)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Vittorio Amuso.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

---

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him or that such court has denied him relief unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

FRAP Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed,

the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. §-636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

(d) Production of statements at evidentiary hearing.

(1) In General. Federal Rule of Criminal Procedure 26.2(a)-(d), and (f) applies at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -vs- VITTORIO AMUSO and VINCENT RICCIARDO, Defendants	DOCKET NO.: CR-90-446 Brooklyn, New York March 20, 1992 **SEALED PROCEEDINGS**

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE

BEFORE THE HONORABLE EUGENE H. NICKERSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	GREG O'CONNELL, ESQ. CHARLES ROSE, ESQ. U.S. Attorney's Office 225 Cadman Plaza East Brooklyn, NY 11201
For the Defendant Amuso:	GERALD SHARGEL, ESQ. ALAN FUDERFAST, ESQ. MARTIN GEDULDIG, ESQ.
For the Defendant Ricciardo:	GENE SINGER, ESQ.
Audio Operator:	Robert M. Karaska

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE

EMPIRE TRANSCRIPTION & RECORDING SERVICE
225 Cadman Plaza East, Room 487
Brooklyn, New York 11201

* * *

[p. 8] MR. SHARGEL: Judge, the Government and I have discussed several potential conflicts of interest that Mr. Amuso is prepared to waive this afternoon. I want to advise you at the outset that this is a case that will be tried by myself. Mr. Fuderfast, my associate who is in my [p. 9] firm, will be assisting me, as well as an independent counsel, Martin Geduldig.

THE COURT: Yes, I know.

MR. SHARGEL: Yes. He's presently before Judge Korman, but he will be part of the trial team as well.

THE COURT: Yes.

MR. SHARGEL: I tell you that because I think you'll find that that would ameliorate some of these conflicts, but in all events, even if they're – even absent independent counsel, Mr. Amuso has been fully apprised, and I have discussed with him in detail all of these potential conflicts, and he is prepared to waive them.

THE COURT: Well, tell me what they are.

MR. O'CONNELL: All right, Your Honor, I'd like to run through this inventory of conflicts. First of all, Mr. Shargel has previously been advised by our office that he is a target, himself, personally, of a criminal tax and obstruction of justice investigation, a matter which

should be made known, first, to his client for his client to consider continuing to have Mr. Shargel represent him here.

The next series of conflicts all concern individuals who were involved in the window case or may factor in the Amuso trial, at least in scenarios that will unfold in the Government's evidence. First, Mr. Shargel, [p. 10] as we understand it, has, for quite some time, represented a codefendant in the superseding indictment, namely Mr. Anthony Casso, who is currently a fugitive.

Mr. Casso –

THE COURT: How do you spell him?

MR. O'CONNELL: Spell his name?

MR. SHARGEL: CASSO.

MR. O'CONNELL: CASSO.

MR. SHARGEL: Casso.

MR. O'CONNELL: Casso.

THE COURT: Casso, Casso.

MR. O'CONNELL: Okay. Mr. Shargel's office is also representing a defendant who was convicted in the windows trial, an indictment which Mr. Amuso was orginally named in –

THE COURT: What was his name, in that trial?

MR. O'CONNELL: Dennis DeLucia.

THE COURT: Okay.

MR. O'CONNELL: Or DeLucia. In addition, Mr. Shargel is currently representing an individual named Michael Vuolo, VUOLO, who is a principal in a garment center trucking company named Triple A. That company and Mr. Vuolo will factor in the Government's proof.

Mr. Vuolo is a potential witness in this case. There are prior representations of several individuals who [p. 11] I'd like to bring to your attention as well. Okay. Mr. Shargel has previously represented, for quite some time, an individual named Sammy Gravano, who is a potential witness in this case.

Mr. Gravano is currently cooperating with the Government. Mr. Shargel represented, for a short time, an individual named Louis Daidone, –

MR. SHARGEL: Let me just say that – and I've told the Government this, with respect to Mr. Daidone, he consulted me. He never retained me, and I didn't represent him. He is being represented by another lawyer in the case in this district, so I never represented him.

THE COURT: But you might have learned some things from him that you have to – within a confidential relationship.

MR. SHARGEL: I can represent to the Court, in his case, that I did not, because I never discussed anything beyond a retainer.

MR. O'CONNELL: Mr. Shargel has also represented a defendant who was acquitted in a trial who was formerly a codefendant of Mr. Amuso. His name is Joseph Zito. He was represented by Mr. Shargel's associate, Alan

Fuderfast, so I'm not certain of the extent of Mr. Shargel's own personal involvement, but Mr. Fuderfast, of course, is a member of Mr. Shargel's office.

[p. 12] Finally, it's our understanding that Mr. Shargel, at one time, several years ago, represented Peter Cervino, who is a witness in the upcoming trial, Your Honor. That particular representation, I understand, was fleeting. It's one which Mr. Shargel claims he can't recall.

We have informed Mr. Shargel that Mr. Cervino's recollection is that he once went to Mr. Shargel's offices with Mr. Zito in connection with a grand jury matter. He was never formally retained. However, he does recall having confidential discussions with him.

At least insofar as Mr. Cervino is concerned, he is prepared to waive any confidentiality problem that might otherwise exist by reason of that brief episode. With regard to the others, that's pretty much the situation.

THE COURT: How about the others, are they prepared to waive?

MR. O'CONNELL: Well, Mr. Casso is not available to waive because he's a fugitive. Mr. DeLucia and Mr. Vuolo, I'm not certain about. Mr. Gravano, I'm not certain about. And there are two other persons. Maybe you could tell us whether you're representing them or not, and that would be Barbara Amuso and Lillian Casso.

MR. SHARGEL: Well, what happened yesterday, the reason that question was just put to me, is that Barbara Amuso is Mr. Amuso's wife, and Lillian Casso is Mr. Casso's [p. 13] wife. They were subpoenaed early

yesterday, and both of them, because of the longstanding relationship, called me.

I'm not looking to – I told Mr. Rose on the telephone yesterday that for the sake of convenience, I would represent Barbara Amuso, but not if it was going to exasperate the conflict issue. If it is, they can be represented by someone else. I don't see that as the problem.

This is something that's been discussed at length with the Government lawyers, over a period of – I was going to say weeks, but really, months. The only potential problem here, insofar as trial management is concerned, is if the Government, and they say they haven't decided, – well, I'll get to that.

If the Government calls Gravano, Mr. Gravano, as a witness here, they have not made up their mind whether they will, and whether it would be in a rebuttal case, I won't understand – and let me add one other thing.

From what I read in the transcript of the Gotti trial, Mr. Gravano has not waived his attorney client privilege, but I have made certain not to share any information that I learned from Mr. Gravano with anyone else on this trial team, certainly including Mr. Geduldig. There is no – I am not contemplating a problem.

THE COURT: Or with Mr. Amuso.

[p. 14] MR. SHARGEL: I'm sorry?

THE COURT: Or with Mr. Amuso.

MR. SHARGEL: Yes. That's absolutely right. I would not be cross examining Mr. Gravano, obviously, and the way this problem can be repaired is simply – and

I've had this in other cases, where I don't – Mr. Gravano would be cross examined, if called, but not be me. So I think that problem is solved.

Now, with respect to Mr. Vuolo, if he's called as a witness, it would be the same ground rule. I will not be sharing any lawyer client confidences, and I would not cross examine him.

MR. O'CONNELL: Your Honor, our understanding of Mr. Shargel's offer to insure, for the record, that Mr. Amuso has been properly advised and counseled regarding this series of conflicts we've outlined here, is that Mr. Geduldig, who is not burdened by any of these conflicts, or any others, to our knowledge, as of today, would be sitting down with Mr. Amuso, himself, and reviewing each one of them and their ramifications, so that Mr. Amuso could then be prepared to make an informed waiver with regard to each of them on the basis of counsel provided to him by Mr. Geduldig.

I understand that that hasn't taken place yet, and for that reason, I don't think it would be appropriate [p. 15] for the Court, perhaps, to conduct a Curcio inquiry until our next appearance, between which time Mr. Geduldig could attend to this matter.

THE COURT: Yes, but let's make that fairly soon, because if there's any hitch, then Mr. Amuso would want to get other counsel.

MR. O'CONNELL: For Monday.

MR. SHARGEL: I don't want to do it Monday. Mr. Amuso is a prisoner being held in Danbury, Connecticut. The MCC is overcrowded enough. I'd rather we put

it on for a week from today, because – so you're back to Danbury. Otherwise, we're going to be out of town.

THE COURT: Pardon?

MR. SHARGEL: We'll both be out of town.

THE COURT: Out of town. Wonderful to be out of town.

MR. O'CONNEL: Judge, let me say this. This is not –

THE COURT: Is he going to be out of town all next week? All right, how about a week from Monday, then?

MR. SHARGEL: That's what I suggested.

MR. O'CONNELL: A week from Monday is fine. I may be on trial in front of Your Honor, so that's fine.

MR. SHARGEL: Let me tell you, so you're not –

THE COURT: Excuse me, gentlemen.

[p. 16] MR. SHARGEL: Let me say this, so that you're not concerned. This is a matter that has been fully discussed between Mr. Amuso and myself. I think he has had some discussions with Mr. Geduldig already, but if you want something more formal, and Mr. Geduldig, who is now in front of Judge Korman, – actually, Judge, we could do it today, to save this trip.

Mr. Geduldig is in the building.

MR. FUDERFAST: He has a sentencing in front of Judge Korman.

MR. SHARGEL: And I think if we have Mr. Geduldig come down now, –

THE COURT: Now, just let me say this to Mr. Amuso. As I see it, there are two things you've got to consider yourself. One is Mr. Shargel is under investigation – may be or is, for some kind of tax matter and obstruction of justice.

Now, that presents a potential conflict of interest, because theoretically, he might want to curry favor with the prosecutors and so go easy – so they'd go easy on him, so he wouldn't give you the full representation that you're entitled to. That's one aspect.

But the other – this is what you should talk about with Mr. Geduldig, and the other aspect is he can't reveal – unless the people that he previously represented [p. 17] waive it.

THE DEFENDANT AMUSO: He can't cross examine them.

THE COURT: Well, leave aside cross examining. He can't reveal anything that was said to him as a lawyer in that confidential relationship, even though whatever he may have learned might be helpful to you.

THE DEFENDANT AMUSO: I understand.

THE COURT: But he's prohibited from revealing it – or not only from revealing – prohibited from revealing it to the Court, but from you yourself.

THE DEFENDANT AMUSO: Right.

THE COURT: So that's the other aspect of it, and you've got to be – you are entitled, in other words, to a lawyer that doesn't have any of these problems.

THE DEFENDANT AMUSO: Right.

THE COURT: Okay, you'll come back later?

MR. SHARGEL: Sure. What time would you like us?

THE COURT: I don't know. I have a hearing at 4:30. What's the story on that?

THE CLERK: There's a hearing that's scheduled for now, Your Honor. The 4:30 matter is off.

THE COURT: What's the hearing now?

THE CLERK: It's a competency hearing.

THE COURT: Why don't you come back at 4:30?

[p. 18] MR. SHARGEL: That would be perfect?

THE COURT: How's that?

MR. SHARGEL: It's perfect. Judge, I think the Government agrees with this. Since it's a grand jury matter, that part of the record that discusses the investigation be sealed, with the Court's permission.

THE COURT: Yes, sure. Do you have any objection to that?

MR. O'CONNELL: No.

MR. SHARGEL: We might be able to take care of this and have us out of your hair.

THE COURT: Don't start with my hair.

MR. SHARGEL: And then very –

MR. ROSE: One more matter, –

THE COURT: Yes.

MR. ROSE: – since it has to do with the conditions of Mr. Amuso's confinement, the Government moves that the Court direct that Mr. Amuso be placed in an administrative segregation with limited telephone calls, those telephone calls limited only to calls to his lawyer.

That's essentially based on our belief that Mr. Amuso was instrumental in directing, ordering, the shooting of a witness's sister last week, specifically Patricia Cappozolo, the sister of former Lucchese captain and Government witness Peter Chiodo.

* * *

[p. 27] MR. O'CONNELL: Thank you, Judge.

THE COURT: Good afternoon.

MR. SINGER: Thank you, sir.

(The Court hears other matters)

MR. SHARGEL: Should we continue this at sidebar, since –

THE COURT: Of course we can. There's no reporters here. Whatever you want.

THE COURT: All right, Mr. Shargel, you and Mr. Geduldig –

MR. SHARGEL: Yes. Mr. Geduldig is here, Mr. Fuderfast is here as well, on behalf of Mr. Amuso, and Mr. Geduldig has had the opportunity to speak to Mr. Amuso at length, and is prepared to answer any inquiry.

THE COURT: All right. There are two aspects to this. One is Mr. Shargel has represented a lot of folks, and one of them is a gentleman who may be a witness who we would cross examine, who probably won't waive, and some of them, I take it, are going to waive.

MR. SHARGEL: Yes, I don't think – with one possible exception, I don't think that the others are witnesses. One is waiving, Mr. –

THE COURT: Well, I thought they said they were potential witnesses.

MR. SHARGEL: Well, several are not potential [p. 28] witnesses, but the Government was simply bringing that to your attention.

THE COURT: Yes.

MR. SHARGEL: For example, Joseph Zito, who was a defendant in the windows case and was acquitted, is not a witness in this case.

THE COURT: Yes.

MR. SHARGEL: And there are several others in that category.

THE COURT: Right, so there are really three categories we're talking about. Those who may be witnesses, – or three parts to this. Those who aren't going to be witnesses, but which you had represented.

MR. SHARGEL: Yes, either I or my office.

THE COURT: And then the other thing is that Mr. Shargel is under investigation.

MR. SHARGEL: Correct.

THE COURT: Have you discussed all these matters with Mr. Amuso?

MR. GEDULDIG: We have. We have, Judge, and as I understand the arrangement, if any witness should testify who does not waive the privilege, then I would be the attorney to cross examine that witness, and I believe that Mr. Amuso has no objection to that procedure.

THE COURT: Okay.

[p. 29] MR. GEDULDIG: And perhaps Mr. Shargel can speak better of the other situations, but I don't think that Mr. Amuso has any problem with the prospect of a Government investigation of Mr. Shargel.

THE DEFENDANT AMUSO: Yes.

THE COURT: All right, now, Mr. Amuso, you have talked to Mr. Geduldig?

THE DEFENDANT AMUSO: Yes, I did, Your Honor.

THE COURT: In the first place, Mr. Shargel being under investigation, you understand.

THE DEFENDANT AMUSO: Right.

THE COURT: Now, there's a potential conflict there, because he may, in order to curry favor with these fine prosecutors, he may pull his punches, so to speak. That's one aspect of it.

Secondly, he has represented people before who – at least one of whom may be a witness, and he's not in a position to reveal any communications he had with that person, whom he represented, even though – or use anything that he learned by those communications that might be helpful to you in your case.

And thirdly, with respect to a person whom he had represented who becomes a witness, he wouldn't be able to successfully cross examine him, because obviously, he known a lot of stuff that might be useful to you in cross [p. 30] examining that witness, which he learned in a confidential capacity, and in that instance, Mr. Shargel will not cross examine, and your other attorney will.

Now, you're entitled to have an attorney who doesn't have any of these problems, in other words, who is perfectly free to use whatever information came into his head that he acquired, and Mr. Shargel is under that inhibition, and by the same token, you are entitled to an attorney who isn't under investigation. Have you focused on all of that?

THE DEFENDANT AMUSO: Yes, I did, Your Honor.

THE COURT: Yes, all right. Do you want me to ask any further questions, Mr. O'Connell or Mr. Rose?

MR. ROSE: Judge, my reading of Curcio, I think, requires that Mr. Amuso articulate, for example, to be certain what he understands these conflicts to be, and perhaps –

THE COURT: Well, yes, all right. Tell me what you think I've said.

THE DEFENDANT AMUSO: I understand that Mr. Shargel has a problem, and that you say he's going to pull punches. I'm not worried about that. I still want him as my attorney.

THE COURT: Okay, but you understand that his problems are two fold.

[p. 31] THE DEFENDANT AMUSO: Right. He can't cross examine –

THE COURT: One is the fact that he's under investigation. The other is not that he's going to pull punches, but that he just can't use information –

THE DEFENDANT AMUSO: I understand.

THE COURT: – that he may have that's useful to you, do you understand that?

THE DEFENDANT AMUSO: Yes, I do.

THE COURT: I don't whether he does have information as a result, but if he does, he's not going to be able to use it.

THE DEFENDANT AMUSO: Okay.

THE COURT: Okay, do you understand that?

THE DEFENDANT AMUSO: Yes.

THE COURT: Okay.

MR. ROSE: And finally, could you just ask Mr. Geduldig if he has had an adequate opportunity to discuss this with Mr. Amuso.

THE COURT: Have you had an adequate opportunity to discuss this?

MR. GEDULDIG: I have, Judge.

MR. ROSE: Thank you.

THE COURT: All right. All right, fine.

THE DEFENDANT AMUSO: Thank you.

[p. 32] THE COURT: Good day to you.

MR. SHARGEL: We're going to next be before the Court on April 2nd at 2:00 p.m.

THE COURT: 2:00. I'll see you then.

MR. SHARGEL: One other thing, Judge. We were discussing with the Government lawyers – as I said before, the motions are due to be filed and addressed to the superseding indictment on Monday, and I'm wondering whether would [sic] could have until Wednesday.

THE COURT: Sure, you can.

MR. SHARGEL: It's just because of spending the day here.

THE COURT: Sure, you can.

MR. O'CONNELL: Could we extend our response to –

THE COURT: And you'll have –

MR. SHARGEL: Two extra days.

THE COURT: – two extra days. All right, good day to you.

MR. SHARGEL: Good day, Judge.

MR. O'CONNELL: Thank you, Judge.

* * *

STATE OF GEORGIA)
COUNTY OF) ss.:

VIC AMUSO, being duly sworn, deposes and says:

1. I am the defendant in *U.S. vs. Vic Amuso*, indictment number 90 CR 446 (EHN). I was convicted of various felony offenses following a jury trial and I am presently serving a sentence of life imprisonment. I submit this affidavit in support of my petition seeking a Writ of Habeas Corpus pursuant to 28 USC §2255. This affidavit is based upon facts personally known to me, except for those events based upon information and belief.

2. The primary issue brought up for review in my petition relates to the failure of the Court to insure that I received conflict free legal representation. Several conflicts existed for my trial attorney, GERALD SHARGEL. These conflicts were known in detail by the Government, Mr. SHARGEL and, to a much lesser degree, the Court. Inadvertently or otherwise, steps were taken by the Government and Mr. SHARGEL which prevented the Court from having a clear understanding of these conflicts. As a consequence the Court made an inadequate effort to advise me of the conflicts, failed to provide necessary information to "independent counsel" so that he could explain the conflicts and set forth my options. Additionally, I was not given sufficient time to consider those options which were explained. The Court's inquiry of my understanding of the conflicts was also inadequate. I was effectively denied a *Curcio* hearing and did not make an intelligent waiver.

CONFLICT RELATING TO THE GOVERNMENT'S INVESTIGATION OF MY TRIAL COUNSEL

3. On March 20, 1992 I was present for a court proceeding which explored possible conflicts of interest faced by my trial attorney, GERALD SHARGEL. A copy of the transcript for this proceeding is attached hereto and marked Exhibit A. At the beginning of this proceeding Mr. SHARGEL notes that independent counsel, MARTIN GEDULDIG, has been retained and his presence will, "ameliorate some of these conflicts." (Exhibit A, p9). He went on to assure the Court that, "even absent independent counsel, Mr. AMUSO has been fully apprised and I have discussed with him in detail all of these potential conflicts, and he is prepared to waive them."

4. This statement is not true and the attached affidavit from Mr. SHARGEL confirms my claim. (See Exhibit B).

5. The Trial Court asked for an explanation of the conflicts alluded to by Mr. SHARGEL. The Government responded, making clear that they had as much information about the conflicts as my trial attorney.

6. AUSA O'CONNELL told the Court that the Government had advised Mr. SHARGEL that he was the target of a criminal tax and obstruction of justice investigation (Exhibit A, p9) and asked that I be informed of this circumstance. This was not done. The prosecutor went on to say that Mr. SHARGEL represented ANTHONY CASSO (a co-defendant in my superseding indictment), as well as DENNIS DE LUCIA (a convicted defendant in

my original indictment). Additionally, Mr. SHARGEL represented MICHAEL VUOLO, an individual the Government said would be a factor in their direct case and might become a witness at my trial. (Exhibit A, p10) He also represented SAMMY GRAVANO, a potential Government witness. There were discussions regarding the representation of JOSEPH ZITO by Mr. SHARGEL's law office (Exhibit A, p11) and legal consulting he provided LOUIS DAIDONE and PETER CERVINO (sic) (Exhibit A, p12). Finally, the Government asked Mr. SHARGEL to explain his role in representing BARBARA AMUSO, my wife, and LILLIAN CASSO, the wife of a co-defendant.

7. Mr. SHARGEL minimized this extensive list of conflicts and advised that he had been in conversation for months with the Government regarding these questions. (Exhibit A, p13). The only conflict with which he saw a problem related to the potential testimony of GRAVANO and VUOLO. He intended to have another attorney, MARTIN GEDULDIG, cross examine those witnesses.

8. The Government asked for an adjournment so that independent counsel could have time to explain in detail the long list of possible conflicts. The designated independent counsel, MARTIN GEDULDIG, was not present for any of these discussions (Exhibit A, p16) and the adjournment was not given. Instead Mr. SHARGEL incorrectly advised the Court that he and I had already "fully discussed" these problems and suggested my waiver could be obtained later that same day and this would avoid scheduling delays. The Court was told that the independent counsel was in the courthouse and would be available for a second call of the case.

9. The Court consented to this suggestion. I was then told that my attorney, " . . . is under investigation – may be or is, for some kind of tax matter and obstruction of justice." (Exhibit A, p16). I was further told this conflict might induce Mr. SHARGEL to "curry favor with the prosecution and so go easy – so they'd go easy on him, so he wouldn't give you the full representation that you're entitled to. That's one aspect." (Exhibit A, page 16).

10. The Government and Mr. SHARGEL were silent as the Court unknowingly made a grossly erroneous characterization of this conflict. On or about January 18, 1991, more than a year earlier, the office of the United States Attorney for the Eastern District of New York submitted a Memorandum of Law in support of a motion seeking to disqualify GERALD SHARGEL from the JOHN GOTTI case (90 CR 1051-ILG). That Memorandum was submitted under seal. (See Exhibit C). At various portions of their Memorandum the Government contended that my trial attorney was a virtual associate of the Gambino L.C.N. and placed the interests of that group and its alleged leader, JOHN GOTTI, before those of his clients. (Exhibit C, pp7-8, 18-19, 26, 37-38). None of this information was made known to me, the Court or my independent counsel. The Government and Mr. SHARGEL were both disingenuous in the extreme. Had I known of these allegations I would never have continued with Mr. SHARGEL as my attorney.

11. Lacking any knowledge of the Government's claim that Mr. SHARGEL was virtually associated with the Gambino L.C.N., I was told to talk with Mr. GEDULDIG about the conflicts pertaining to my trial attorney and his prior representation of GRAVANO, VUOLO and

others. The Court went on to ask me a series of questions to which I gave one or two word answers. My case was to be recalled at 4:30, at which time my attorney felt, "We might be able to take care of this and have us out of your hair." (Exhibit A, p18).

12. Later on March 20, 1992 all parties reconvened, along with MARTIN GEDULDIG. The Court described the three part aspect of Mr. SHARGEL'S conflicts – former clients who may become trial witnesses; former clients who will not become trial witnesses but had a role in the case; the Government investigation of my attorney. The court asked independent counsel if we discussed these aspects.

13. Mr. GEDULDIG explained his understanding of these matters. He was to be used as an independent counsel and cross examine witnesses formerly represented by Mr. SHARGEL. It was clear he had very little information regarding the Government investigation of Mr. SHARGEL and said SHARGEL should address that situation. (Exhibit A, p29). Mr. GEDULDIG said he did not think I had a problem with that investigation.

14. Attached to this petition and marked Exhibit D is an affidavit from MARTIN GEDULDIG. In that affidavit Mr. GEDULDIG states he was told that the investigation of Mr. SHARGEL involved unreported income and nothing more. He was not told of any Government claims that Mr. SHARGEL put the interests of JOHN GOTTI, or the Gambino L.C.N. before those of his clients. He was not told of the existance of tape recorded conversations between SHARGEL and GOTTI. Nor was he told that my

trial attorney was the subject of conversations surreptitiously recorded by the Government. It was his understanding that the investigation involved only a claim of tax evasion and that the allegation of obstruction of justice was related to the tax evasion claim. His understanding was based upon information provided by Mr. SHARGEL. The Government told him nothing about the conflicts of interest which existed.

15. Mr. GEDULDIG and I discussed the effect a tax evasion investigation might have on the ability of Mr. SHARGEL to provide effective representation. We concluded such an investigation would not cause trial counsel to "pull his punches," as the Court suggested. We had no idea of the serious and complex nature of the conflict involving the Government investigation of Mr. SHARGEL. As Mr. GEDULDIG states in his affidavit, we never had a discussion about the true nature of this specific conflict.

16. Following the limited conversation I had with Mr. GEDULDIG, the Court repeated its minimal inquiry. Again, I provided little more than one and two word answers to the Court's questions. One prosecutor was troubled by my superficial responses and suggested I more fully articulate my understanding of the various conflicts.

The Court asked my thoughts.

> "I understand that Mr. Shargel has a problem, and that you say he's going to pull punches. I'm not worried about that. I still want him as my attorney." (Exhibit A, p30).

17. Again, I was asked a series of questions regarding the conflicts as erroneously described by the Government and my trial counsel. Again, I provided one and two word answers. Independent counsel was asked if we had an adequate opportunity to discuss these problems and he replied affirmatively. The Court's inquiry was concluded.

18. It should be noted that soon after this tainted inquiry, MARTIN GEDULDIG was removed as my independent counsel. This was done at the suggestion of Mr. SHARGEL. MICHAEL ROSEN was his replacement. It must be noted that MICHAEL ROSEN is named by the Government as an attorney with whom Mr. SHARGEL has an exceedingly close working relationship. (See Exhibit C, pp24-26, 30-32). Having ROSEN replace GEDULDIG amounted to the withdrawal of truly independent counsel. It was clear to the Government and Mr. SHARGEL that ROSEN would do nothing which might undermine the position taken by GERALD SHARGEL.

The trial was about to begin and I was represented by a totally flawed attorney. The Government fully understood my predicament and took no action. The Court and I were badly served.

19. In approximately January, 1997 I learned for the first time that the investigation conducted of Mr. SHARGEL by the United States Attorney for the Eastern District of New York involved allegations that he placed the interests of JOHN GOTTI and the Gambino L.C.N. before those of his clients. The Government allegations were primarily based upon tape recorded conversations between Mr. GOTTI, Mr. SHARGEL and others. Some of

the recordings had Mr. SHARGEL as the topic of conversation. I knew none of this on March 20, 1992, or at the time of my trial. Mr. SHARGEL, the Government and Mr. GEDULDIG did not advise me about this conflict. I was led to believe by Mr. SHARGEL that the Government investigation related solely to tax evasion. I was told the obstruction of justice claim was connected to a failure to report cash income. Mr. SHARGEL's attached affidavit, as well as that of Mr. GEDULDIG, affirms my contention.

20. "GOTTI Tapes" were played at my trial. I immediately asked Mr. SHARGEL to vigorously fight their inclusion. Once in evidence, I wanted other "GOTTI Tapes" to be used in an effort to attack their credibility. I had no idea that Mr. SHARGEL was a participant in some of those conversations. He declined to follow my advice. I now know his reluctance was predicated on the fact that his relationship with JOHN GOTTI would be fully disclosed and the tapes might be interpreted as reflecting illegal activities by my attorney. Attacking the tapes might place him in the untenable position of being a witness to relevant recorded conversations. The conflict vaguely and disingenuously alluded to by the Government and Mr. SHARGEL on March 20, 1992 played a substantial role in my trial.

21. The importance of the "Gotti Tapes" in my prosecution became abundantly clear during jury deliberations. The jury asked to hear "GOTTI Tapes" in which I am discussed. The inability of my attorney to attack the use of this tape, or use other tapes to undermine their credibility was due entirely to the conflict of interest he faced. He and the Government effectively concealed this conflict from me and the Court. My defense was totally

undermined and this led directly to my conviction. Had I known the full scope of the Government's investigation into Mr. SHARGEL's activities I would not have retained him as my attorney.

22. I was improperly denied effective representation by a conflict free attorney. Ineffective steps were taken by the Court in an inquiry which would not determine the full context of my attorney's conflict of interest. The Government and my trial attorney misled the Court and my independent counsel. For this and other reasons my conviction should be set aside and I should be granted a new trial.

CONFLICT RELATING TO MY TRIAL COUNSEL'S REPRESENTATION OF MY CO-DEFENDANT – ANTHONY CASSO

23. As was stated earlier, at one point during the proceeding held on March 20, 1992 the Government provided an extensive list of people my trial attorney had previously represented. AUSA O'CONNELL stated that some of these individuals created the possibility of a conflict of interest. The Government advised the Court that Mr. SHARGEL had represented ANTHONY CASSO, a co-defendant in my superseding indictment, "for quite some time." (Exhibit A, p10). The Government went on to say that CASSO was then a fugitive. Thereafter, AUSA O'CONNELL listed a number of others who might present a problem, DE LUCIA, VUOLO, GRAVANO, DAIDONE, ZITO, CERVINO (sic), BARBARA AMUSO and LILLIAN CASSO. (Exhibit A, pp11-12).

24. The Court asked my trial attorney to respond to this list of people.

> Mr. Shargel: " . . . the only potential problem here, insofar as trial management is concerned, is if the Government, and they say they haven't decided, – well, I'll get to that.
>
> If the Government calls Gravano, Mr. Gravano, as a witness here." (Exhibit A, p13).

He went on to say the GRAVANO problem and that of VUOLO would be taken care of by having Mr. GEDULDIG act as independent counsel. (Exhibit A, p14).

25. Later in this proceeding the Government made an application which sought to restrict my movements while incarcerated pending trial. During this verbal application AUSA ROSE said that my co-defendant ANTHONY CASSO and I were responsible for a number of murders. The prosecutor characterized us as a "team." (It should be noted that Mr. GEDULDIG was not present during this colloquy) (Exhibit A, p19).

26. When my case was recalled later that afternoon the Court again inquired of my trial counsel about the people he had previously represented. (Mr. Geduldig was now present).

> The Court: " . . . One is Mr. Shargel has represented a lot of folks, and one of them is a gentleman who may be a witness who we (sic) would cross examine, who probably won't waive, and some of them, I take it, are going to waive."
>
> Mr. Shargel: Yes. I don't think – with one possible exception, I don't think that the others are witnesses. One is waiving. Mr.. . . .

The Court: "Well, I thought they said they were potential witnesses."

Mr. Shargel: "Well, several are not potential witnesses, but the Government was simply bringing that to your attention." (Exhibit A, pp27-28).

27. Mr. SHARGEL knowingly intended to lump CASSO (whose name is never mentioned at the afternoon session) among those individuals who would not be testifying as a witness at my trial and, therefore, did not create a potential conflict. This oversimplification misrepresented the problem. Evidence would be introduced at my trial which directly inculpated SHARGEL's client and my co-defendant – ANTHONY CASSO. He knew this situation would arise. The earlier "team" statement of AUSO ROSE made it obvious. But, Mr. SHARGEL chose to falsely imply that nothing had to be done to alleviate the problem because CASSO was a fugitive. Again, the Government and my trial counsel kept the Court and my independent counsel in the dark about this clear conflict of interest.

28. Had I been advised that Mr. SHARGEL would have been called upon to defend his fugitive client, ANTHONY CASSO, in the middle of my trial, I would not have retained him as my attorney. This situation did arise. I wanted Mr. SHARGEL to show that CASSO acted on his own, without my direction or approval. He was extremely reluctant to follow my instructions and in my view failed to properly place blame for CASSO's criminal activity on my co-defendant's shoulders. He failed because of the conflict of interest which existed. The

conflict was known to the Government and Mr. SHARGEL, but I was never advised of this problem.

DISCOVERY OF DRUG DEALING BY AL D'ARCO

29. During approximately the past two weeks it has been learned that information, investigation reports and evidence has been released by the District Attorney of New York County regarding illegal drug dealing committed by AL D'ARCO. Upon information and belief the material was reluctantly revealed pursuant to Court Order. Apparently, D'ARCO was expected to testify at a federal trial in the Southern District of New York and the defense learned about D'ARCO's illegal drug dealing. Discovery motions were filed and opposed by the Government. Judge Lewis A. Kaplan directed the release of the sought after information. The Order of Judge Kaplan was only recently complied with and I have not yet been able to look at any of this newly discovered material.

30. It should be recalled that D'ARCO was clearly the most important and compelling witness at my trial. He testified about direct knowledge he claimed to have of conversations in which I was a participant. He claimed he often acted on my orders and testified about my role in the conspiracy in which I was charged. He testified I was the boss.

31. Moreover, his manner of testifying was compelling. He was funny, entertaining, interesting and appeared to be knowledgeable. Most importantly, he seemed to be truthful. His truthfulness was a critical factor and without it the jury would likely have rejected

his testimony. The outcome of my trial would undoubtedly have been different if the jury did not believe D'ARCO.

32. During D'ARCO's testimony he said he had not been involved in illegal drug transactions since his last release from prison. He created the impression that, to a degree, he had been reformed. He became a colorful character who would not commit certain crimes. This added to his mystique before the jury and made him more acceptable. He was such a compelling witness that the Government later used him in a number of other high profile trials.

33. It now appears that D'ARCO's most endearing quality, his refusal to deal with illegal drugs, is an illusion. His testimony was untrue. This information was known to the District Attorney of New York County and was either known or should have been known to the federal prosecutors in my case.

34. Due to statutory time constraints, I am now compelled to raise this issue. It is my belief that I will soon have in my possession some of the reports generated by the New York County District Attorney. At that point I will supplement this petition and provide the details needed to establish D'ARCO's duplicity at my trial. Certainly, the combination of my trial attorney's hidden conflicts and D'ARCO's perjury make a new trial in my case a necessity.

/s/ Victor Amuso
VIC AMUSO

Sworn to before me
this 2 day of APRIL 1997.

/s/ James Morgan
NOTARY PUBLIC

Notary Public, Newton County, Georgia
My Commission Expires June 19, 2000

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MARTIN GEDULDIG, duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law before the United States District Court for the Eastern District of New York and maintain a law office at 400 South Oyster Bay Road, Hicksville, New York 11801. I am submitting this affidavit in support of the petition of VIC AMUSO made pursuant to 28 USC 2255. Mr. AMUSO was a defendant in *U.S. v. VIC AMUSO*, 90 CR 446 (EHN).

2. I have known Mr. AMUSO since approximately 1986. During the summer of 1991 he was arrested on the aforementioned indictment and I represented him at the early stages of this matter. Several months later GERALD SHARGEL was retained as trial counsel, but I continued to play a role as a member of the defense team.

3. In early 1992 I was advised by Mr. AMUSO that Mr. SHARGEL had a conflict of interest which prevented him from cross-examining certain prospective witnesses at his upcoming trial. I was asked by Mr. AMUSO to speak with Mr. SHARGEL and learn the details of the conflict. Soon thereafter, I spoke with Mr. SHARGEL.

4. During this conversation I was advised that several former clients of Mr. SHARGEL might be called as witnesses at the AMUSO trial. Due to the attorney-client privilege, it was not possible for Mr. SHARGEL to cross-examine these individuals. He told me the names of the people involved and asked if I knew any of those he cited. I did not have a professional relationship with any

of the listed prospective witnesses. ANTHONY CASSO was not one of those individuals cited by Mr. SHARGEL. I was told by Mr. SHARGEL that an independent attorney would be retained in order to avoid the conflict which might arise if he was called upon to question these people. He would not be given any privileged information and would develop cross examination from documents given to the defense through discovery procedures. I was further told that Mr. Amuso suggested I be that independent counsel and Mr. SHARGEL stated he would suggest my name to the Government. I agreed to this procedure. I was later advised that the Government had no objection to my proposed role as independent counsel.

5. On March 20, 1992 I appeared in Court for a possible *Curcio* hearing. Prior to the case being called I was told by Mr. SHARGEL, for the first time, that he faced a tax evasion investigation and this posed another possible conflict of interest. I was advised that the Government claimed Mr. SHARGEL received legal fees in cash which he failed to report as income. I was not told about any allegations involving obstruction of justice. The Government at no time spoke to me about the conflicts of interest faced by Mr. SHARGEL.

6. I spoke to Mr. AMUSO about the conflicts involving the witnesses formerly represented by Mr. SHARGEL. I explained that I would cross-examine those witnesses from materials discovered by the defense. SHARGEL would not be asked to provide any privileged information. Mr. AMUSO accepted this procedure. I also told him that Mr. SHARGEL was being investigated for tax evasion and there was some concern this might effect the quality of legal representation he would provide. I stated

I had been told SHARGEL was being investigated for failing to report cash income. Mr. AMUSO said he believed his attorney could put his tax problems aside during the trial. Both he and I did not believe this was an extraordinary problem. We never discussed the question of obstruction of justice, or Mr. SHARGEL's representation of ANTHONY CASSO. CASSO's name was never mentioned to me by SHARGEL at any point in time.

7. Shortly after this discussion we appeared in Court. The judge asked Mr. AMUSO a series of questions. It was then I heard for the first time that the Government claimed a conflict relating to obstruction of justice. The conflict was phrased in a manner which led me to believe it was directly connected to the tax evasion conflict and I asked that Mr. SHARGEL more fully describe this problem. This was not done and I took no further action. Had I known the Government believed Mr. SHARGEL placed the interests of JOHN GOTTI before those of his other clients, had tape recorded conversations in which he was a participant and the Government planned to play some of those "Gotti Tapes," I would have advised Mr. AMUSO to retain different trial counsel.

8. The court asked Mr. AMUSO a series of questions. He responded and Mr. SHARGEL was permitted to remain as trial counsel.

9. Shortly after this appearance I was called by Mr. SHARGEL and told that MICHAEL ROSEN would replace me as independent counsel, but I would remain a member of the defense team. I spoke with Mr. AMUSO about my substitution and was told Mr. Rosen and Mr. SHARGEL shared office space and had known one

another for many years. It was decided the defense would be better served by having Mr. ROSEN fill my role. I was told that Mr. SHARGEL suggested this change.

10. Thereafter I was minimally involved in Mr. AMUSO's defense, primarily helping to review juror questionnaires. I first learned in approximately January, 1997 that the obstruction of justice and tax evasion conflicts related to Government claims that Mr. SHARGEL was a virtual associate of the Gambino L.C.N. and had been accused of placing the interests of JOHN GOTTI before those of his clients.

/s/ Martin Geduldig
MARTIN GEDULDIG

Sworn to before me
this 21st day of April, 1997.

/s/ Richard F. Gluszak
RICHARD F. GLUSZAK
Notary Public, State of New York
No. 4687647
Qualified in Nassau County
Commission Expires Dec. 31, 1999

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

GERALD SHARGEL, being duly sworn, deposes and says:

1. I represented VIC AMUSO in the matter of US vs. VIC AMUSO, 90 CR 446. On March 20, 1992 the Government advised the trial court of possible conflicts of interest which might exist if I acted as the trial attorney for Mr. AMUSO. The court was told of allegations involving tax fraud and obstruction of justice.

2. The allegation of obstruction of justice arose, in part, from a great number of secretly recorded conversations. The individual primarily being recorded was JOHN GOTTI. I was a participant with Mr. GOTTI in some of those conversations. I was also a subject of discussion between Mr. GOTTI and others. As a result of these recorded conversations, and possibly other information known to the Government, federal prosecutors in the Eastern District of New York believed for a period of time that I was in some way associated with JOHN GOTTI and the GAMBINO L.C.N. They would claim that I placed the interests of Mr. GOTTI and/or GAMBINO L.C.N. before those of clients I represented. I have always strenuously denied these allegations. Still, the Government successfully relied upon these claims to have me disqualified in US vs. GOTTI et al, 90 CR 1051.

3. At the time I represented Mr. AMUSO I was aware of the Government's aforementioned position. At that time I also knew of other conflicts which would exist if I was called upon to cross-examine certain Government

witnesses I had represented in the past. To overcome this specific conflict MARTIN GEDULDIG was to be retained as trial counsel in the AMUSO case for certain limited purposes. He would be called upon to cross-examine those Government witnesses with whom I had a conflict. It was satisfactory established that Mr. GEDULDIG did not have a conflict with any of those prospective witnesses.

4. On March 20, 1992 I appeared before Judge Eugene H. Nickerson, along with VIC AMUSO, prosecutors ROSE and O'CONNELL. MARTIN GEDULDIG would appear at a later point in time. On that day Judge Nickerson was told of the conflicts which existed. Mr. GEDULDIG was to advise Mr. AMUSO about the details of those conflicts. However, to my knowledge he was not informed about details relating to the allegations of tax evasion and obstruction of justice. Nor was the Court or Mr. AMUSO told on the record about those specific allegations.

5. Mr. AMUSO was generally told of possible conflicts involving witnesses, tax evasion and obstruction of justice and was asked that same day to waive his rights under the Sixth Amendment so that I could continue to act as his attorney. He made such a waiver.

6. I have read the transcript for the proceedings held on March 20, 1992 and they are accurate. Mr. AMUSO was not given any more information about my conflicts than is reported in that transcript.

7. This affidavit is being given in response to a request by MARTIN GEDULDIG. I am advised that Mr.

GEDULDIG intends to use it as an Exhibit in a petition pursuant to 28USC §2255.

/s/ Gerald Shargel
GERALD SHARGEL

/s/ Illegible

Sworn to before me
this 1st day of March 1997.

JEFFREY H. LICHTMAN
Notary Public, State of New York
No. 31-4978120
Qualified in New York County
Commission Expires February 25, 1999

WJM:JG:lp
F. #9004423
JG000269.MEM

SUBMITTED UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

90 CR 1051 (ILG)

- against -

JOHN GOTTI, *et al.*,

Defendants.

----------X

THE GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN ORDER DISQUALIFYING COUNSEL

ANDREW J. MALONEY
United States Attorney
Eastern District of New York

JOHN GLEESON
LAURA A. WARD
PATRICK J. COTTER
Assistant U.S. Attorneys
(Of Counsel)

* * *

5. Additional Evidence of Shargel's Role as a Conduit of Information to John Gotti

The evidence will support the inference that Shargel had access to a variety of sources of information. One such source was prosecutors, and Shargel would pass on what he learned. For example, on November 30, 1990, John Gotti informed Coiro that Shargel had learned from Charles Rose, an Assistant United States Attorney in this district, that two of Shargel's clients, Gravano and Luchese Underboss Anthony Casso, would not be indicted together in the "Windows" case:

> -JG: . . . With Sam, he and my brother Pete. That "Window" indictment, Charlie Rose told Gerry Shargel yesterday, he told him. Gerry Shargel asked him, he said, "I got bunch of cases coming (IA)." So he says, "Listen, as far as the 'Window' indictment, end of February, beginning of March. Guaranteed!" So he says, "Well, ya know," he said, "I got a conflict there. But I'm not gonna have a conflict there," he says. "I've got Gravano, Casso." He says, "Let me put your mind at ease. They'll be on separate indictments."[1]

That Shargel would report to Gotti information about such investigations (even when obtained from legitimate

---

[1] Assistant U.S. Attorney Rose is one of the prosecutors responsible for *United States* v. *Gigante, et al.*, 90 CR 446 (RJD), which is also known as the "Windows" case. The indictment includes Peter Gotti and Anthony Casso among 14 named defendants, and was returned on May 30, 1990.

to other avenues of information as well. As set forth above, Shargel was present in the Hallway on November 20, 1989 immediately after Corrao and Helbig reported to Gotti about the Castellano murder

* * *